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No. 882

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

LOUIS GUIDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Louis Guido, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURT BELOW

On January 8, 1964, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, sentencing defendant to imprisonment for a term of ten years. The Court of Appeals' opin-

ion has not as yet been reported. It is printed here as Appendix "A".

JURISDICTIONAL STATEMENT

On a jury trial defendant was convicted of conspiracy to violate the narcotic laws contrary to Title 21, United States Code, Section 174.

On appeal to the Court of Appeals for the Seventh Circuit the judgment of conviction was affirmed by an opinion filed January 8, 1964 (Appendix "A").

A petition for rehearing was timely filed and was denied on January 31, 1964 (Appendix "B"); and further denied by the court en banc, Appendix "B1".

The jurisdiction of this court is invoked under the provisions of Title 28, U.S. Code, 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where it was never shown that the defendant ever talked about narcotics, ever received money for narcotics, ever made one statement or committed one act by which it could be concluded he conspired with others to violate the narcotics law, and where the trial court in deliberating whether or not to direct a verdict of acquittal at the close of the government's case expressed considerable doubt about the sufficiency of the evidence at that stage, can a conviction of conspiracy be suffered to remain even though there may be sufficient evidence against other defendants?

2. Where the entire case against the defendant depended upon a government witness who was an eight times convicted felon who made a deal with the government that for release from a life sentence in a state penitentiary and for a grant of immunity he would testify, and where there was not a word of corroboration for his story, may the court refuse to instruct the jury, as requested, to take into consideration in evaluating the credibility of the witness

the fact that the witness had previously been convicted of felonies?

3. Where there was no independent evidence establishing defendant's participation in a conspiracy with four other defendants, may hearsay declarations and acts committed outside of his presence be admissible as to him?

4. Where the chief witness against the defendant was an eight-times convicted felon who testified on cross examination that he denied his participation in any of the activities when he first appeared before the grand jury, was it not a violation of defendant's right to a fair trial for the trial judge to strike the answer of the witness;

And did not such ruling of the court render meaningless its instruction to the jury that the "credibility of a witness may be attacked by introducing evidence that on some former occasion, he made a statement, or acted in a manner inconsistent with his testimony in this case, on a material matter";

And was not the prejudice to defendant's case the more compounded when the prosecutor was permitted to argue to the jury, over objection, and without any basis in the record, that the same witness told the truth before the grand jury and told the truth in the trial court?

5. Where a "particularized need" was demonstrated for review of the grand jury minutes of the chief government witness—where that witness testified he gave different testimony before the grand jury than at the time of trial (albeit the trial court struck from the jury's consideration such testimony)—and where the Court of Appeals during the pendency of the appeal ordered the trial judge to examine the grand jury testimony *in camera* and to certify the grand jury minutes to the Court of Appeals, and where the Court of Appeals read the grand jury testimony of the witness "... and agreed with the trial judge that no material inconsistencies appear".

Is it not a deprivation of the defendant's essential right to cross examine to deny defendant's counsel the opportunity to compare admitted falsities in the grand jury testimony with that of trial testimony, especially where the witness's trial testimony against the defendant was so weak, so insubstantial and so inconclusive as to have caused the trial court considerable doubt in allowing the case to be submitted to the jury at all? and

Were not the traditional reasons for keeping the grand jury minutes secret outweighed under the circumstances set out here? Should not a defense counsel be permitted to evaluate the differences between grand jury and trial testimony in order that appropriate and pointed cross examination be had? Should not this court resolve the apparent conflict existing between the rule in the Seventh Circuit and that in the Second Circuit (*United States* v. *Zborowski*, 271 F.2d 661, 666 and the District of Columbia Circuit, *Gordan* v. *United States*, 229 F.2d 171, 181) under circumstances such as here?

6. May the defendant be denied the right to cross examine a witness about the details of the subject matter of his direct examination where the testimony gave rise to arguable inferences?

And where the limitation on cross examination was imposed in connection with the only two witnesses against the defendant, was he not essentially deprived of due process of law in trial procedure?

7. Was it error for the court to fail to grant a mistrial due to unfavorable headline publicity occurring almost daily during the trial? Should not the court, upon request, have polled the jury individually as to the effect of banner headlines appearing in every one of the Chicago metropolitan newspapers on the day before the case was to be argued to the jury?

8. Was the defendant denied his constitutional right to a review in the Court of Appeals when the reviewing court failed to pass upon a claimed error essential to the consideration of the case, and when such failure to rule was pointed out to the reviewing court upon the petition for rehearing?

In this context, was it not error to fail to review the claim of petitioner that in a narcotic conspiracy case possession by another defendant is not enough: that because of the presumptive feature of Section 174, Title 21, U.S. Code it was necessary to show either actual or constructive possession on the part of the defendant, and none being shown, was not the conviction predicated upon insubstantial evidence?

9. Under what circumstances is it an abuse of the trial judge's discretion to deny defendant's motion for a bill of particulars in its entirety? In a nineteen count indictment, where the defendant was charged only in one count, the conspiracy count wherein he was charged that for a period of almost three years, he conspired with thirty-two other individuals to import narcotics contrary to law, and where 24 alleged overt acts are set out in which the defendant was mentioned only once to the effect that he had a conversation with a named alleged co-conspirator, is not the defendant entitled to any of fifteen requests made for some particulars in order that he may be properly apprised to defend himself?

10. Even stretching beyond breaking point all of the inferences from the testimony favorable to the government were not separate conspiracies shown and therefor improperly joined?

STATUTES INVOLVED

Section 174, Title 21, United States Code (relevant portion set out in Appendix "C").

STATEMENT OF THE CASE

Petitioner Guido was indicted with 18 others for conspiracy to receive and conceal narcotics after importation into the United States, knowing the same to have been unlawfully imported in violation of Section 174(a), Title 21, U. S. Code. Guido was named in only count 1, the conspiracy count. However, the indictment carried 19 counts, each count from 2 through 19 alleging a separate substantive offense against one or more of the other defendants named in the conspiracy count.

The indictment was returned on October 2, 1962 (A. 1), and the defendant was arraigned on November 19, 1962 (A. 1), he voluntarily having surrendered himself (A. 142).

Motions of Guido to dismiss the indictment (A. 2), for a bill of particulars (A. 2), for a severance (A. 3, 4), for a continuance because of a lack of time for preparation between arraignment and trial date (A. 7), and for a continuance or a change of venue based upon prejudicial publicity (A. 7), were all denied.

Guido's several motions for mistrials due to prejudicial publicity during the course of the trial (A. 10, 11, 12, 13, 14, 127) were overruled, and his motions to poll the jury individually with respect to the prejudicial publicity (A. 10, 128) were also overruled (A. 10, 130). His motions for a severance made during the course of the trial (A. 10, 11, 12, 13, 14), were also denied.

During the course of the two week trial, only two witnesses appeared who mentioned Guido. (A third witness, the manager of an apartment building containing 100 apartments, also mentioned Guido, as being an occupant of one of the apartments in November, 1960. A. 94).

Government witness Frank Milazzo testified he first lied to the representatives of the government when they interviewed him regarding the matters about which he gave testimony (A. 51). He subsequently appeared before the federal grand jury on four occasions and he lied before the grand jury, as he testified that his testimony on the witness stand was different from his testimony before the grand jury (A. 51).

Demand was made for the production of the grand jury minutes for the purposes of cross examination (A. 51) or for the court's examination *in camera* (A. 52), but the motions were denied.

After the case was argued orally on appeal, the Court of Appeals ordered the trial judge to examine the grand jury testimony *in camera* and to certify to the reviewing court whether there were inconsistencies in the testimony of the witness Milazzo and if so, whether they were material; and further ordered the trial judge to transmit to the reviewing court the grand jury testimony (Opinion, Appendix A, pp. 7-8). The trial judge certified that upon comparison of grand jury testimony with the transcript at the trial that there were no material inconsistencies. The Court of Appeals read the grand jury testimony and agreed with the trial judge that no material inconsistencies appeared and that, therefore, denial to the defense of the use of the grand jury testimony to impeach was not prejudicial (Opinion, Appendix A, p. 8).

The prosecutor, in arguing the case to the jury, stated that the witness Milazzo told the truth before the grand jury (A. 132). (Defense counsel objected on the ground that when the defense asked that the grand jury minutes be examined *in camera*, the prosecutor objected and the demand was refused; therefor it was improper for the

prosecutor to state what the witness testified to before the grand jury when defense was denied the grand jury minutes. The objection was overruled by the court. A. 132).

THE EVIDENCE AGAINST PETITIONER.[1]

Government witness Frank Milazzo testified he was released from the Illinois State Penitentiary on parole on July 5, 1960. He saw and met defendant Alex Micele several times and had conversations with Micele and with one D'Agostino, also known as Hooks, about narcotics (A. 38).

Milazzo stated that when he was in the Club LeFemme with Micele about the last week in July, 1960, he happened to meet Louis Guido there and as he and Micele were leaving the club, Louis Guido walked them to the door and remarked, "Let's get Frankie back in action." They left the club without answering (A. 41).

About the last part of September, 1960, Milazzo met defendant Pellegrini in some restaurant in Cicero. (The court advised the jury the testimony was offered only against Pellegrini and not against any other defendant. A. 41). Milazzo asked Pellegrini if he knew anyone to whom he could push junk and Pellegrini said he wasn't sure but would find out and let him know. Milazzo then testified to engaging in several narcotic transactions with Pellegrini and that he obtained the narcotics which he gave to Pellegrini from Micele. In October, 1960, Milazzo and Pellegrini had another narcotic transaction; Milazzo obtained the alleged narcotics from Micele. Micele asked

[1] Inasmuch as one of the reasons for the allowance of the writ is the claimed insufficiency of the evidence as to petitioner, it is necessary to set out at some length the evidence for and against him.

Milazzo again, "Are you sure you know who the party is, whether we can trust him or not?" Milazzo told Micele not to worry. About a week later he had another narcotic transaction with Pellegrini, after getting the alleged narcotics from Micele. Some time later he invited Pellegrini into a little coffee shop around Polk and Sacramento Streets and told Micele he wanted Micele to meet Pellegrini; he introduced Pellegrini to Micele (A. 45).

About two weeks after that, he went to the Club LeFemme alone. He happened to see and talk with defendant Guido. Guido remarked that Alex and Hooks owed him $1,800.00 (A. 45). He had been in the Club LeFemme prior to that time on many other occasions.

Some time in the middle of October he was seated in Micele's car and Micele asked if he wanted to go along to the Club LeFemme. Micele said he had to bring some money to the club. When they went to the Club LeFemme, Micele remarked that Loui wasn't there. They had a few drinks at the bar and Micele said, "Well, I will leave the money with someone for him", and, then, after Micele left for a few minutes, he returned, stating, "I left the money for Louis". (A. 46). The witness stated Micele said the amount was $1125.00 (A. 46).

Some time in the last part of October, 1960, Pellegrini accompanied him on his calls for the aluminum company for which he was working and they spent the whole day together. Pellegrini made some phone calls and said that the people he spoke to didn't want any narcotics because they complained the stuff was no good (A. 46). Later that night he met Micele and told him they were getting complaints that the stuff wasn't any good. Three or four days later he met Pellegrini again in a restaurant in

Cicero and Pellegrini told him that the people were getting leery because the stuff was spoiled a couple of times (A. 47). They argued about it (A. 47).

In either the middle of October or the last week in October, 1960, he saw Louis Guido at the Club LeFemme. No one else was present. "He (Guido) asked if Alex had discussed with me, told me about us being partners. I told him no, Alex didn't say anything to me, and I walked off." (A. 47).

In about the last week of October, 1960, Milazzo saw Micele and told him that the people were getting wary because the quality was getting worse and worse and they were afraid that they would be cheated. Once, about the first week in November, the witness gave Pellegrini two cellophane packages containing white powder and went with Pellegrini to meet a man in the vicinity of 14th Street and Millard Avenue, where Pellegrini gave the man the packages (A. 48). Later, in the first week of November, 1960, Pellegrini told him there was a man from St. Louis who wanted a good grade of narcotics. On November 10, 1960, he talked with Pellegrini and Micele on Sacramento and Polk Streets and there was a discussion about the quality of the narcotics being bad and that the customer was not satisfied. Micele made a telephone call from a tavern (A. 49). Micele said it would be straightened out the following night. Pellegrini asked why it couldn't be straightened out that night. "Mr. Pellegrini asked me if we needed this man (Micele). He didn't like the way he was acting." (A. 49). The next day, November 11, 1960, the witness met Micele and Pellegrini in his sister's house. The three of them got into a car with Micele. There was a brown paper bag laying on the seat; he took the paper bag and put it in his lap. They drove to 732 Bittersweet Street, where he was arrested in the lobby. (A. 50).

On cross examination, Milazzo stated the first time he met Louis Guido in the Club Le Femme was quite by accident around July 21 or 22, 1960. Guido was a customer in the place and was drinking with a woman companion. During the time he saw Guido, they were drinking and engaged in just general conversation.

(To the question put to Milazzo by Guido's lawyer, "Were you ever partners with Micele in any other criminal enterprises?" both counsel for Micele and the prosecutor objected; the court sustained the objections. A. 64). To the question, "You were a partner with Alex Micele in the commission of armed robberies, were you not?" the court sustained the objections of counsel for Micele and for the government. Guido's counsel explained that on direct examination, Milazzo stated that Guido asked the witness if Alex had discussed anything about their being partners and that he should be permitted to cross examine the witness with respect to "partners", (A. 64). The court admonished Guido's counsel not to ask that type of question and counsel for Guido made an offer of proof to the effect that the inquiry from Milazzo would show that prior to the comment of Guido that the "action" engaged in by the witness Milazzo and defendant Micele were robbery and burglary actions—never narcotic actions and that there was never any discussion between Guido and the witness about narcotics; that it would be shown upon questioning of Milazzo that he was a partner of Micele in robberies and that Milazzo and Micele were convicted together for robbery and that the type of "action" the witness Milazzo and defendant Micele engaged in during the period of alleged narcotic activity was in fact robbery and burglary action." (A. 65).

On further cross examination Milazzo testified that when Guido said that Micele and Hooks owed $1800.00, Guido did not say what the money was for. So far as the witness knew, it could be a gambling debt (A. 67). Milazzo further stated that at the time when he went to the Club LeFemme with Micele and Micele left some money for somebody named "Lou", Micele did not say he left the money for Louis Guido. Micele did not mention any last name. There were in fact three men known as "Lou" at the Club LeFemme, one of whom was Louis Vasselli, the manager. There was another Louis, whose name he did not recall, who was also a customer at the Club LeFemme (A: 67).

Mrs. Patricia Guido testified she was the sister-in-law of Louis Guido and was married to Nick Guido, Louis' brother. She knew Louis Guido lived in apartment 1406 at 732 Bittersweet, Chicago, in 1960. In November, 1961, she first met Louis Vasselli at Louis Guido's apartment in the presence of Louis Guido's girlfriend, Mary, and Nick Guido. Louis Guido and Louis Vasselli went into a bedroom and closed the door. She saw Louis Vasselli at Louis Guido's apartment during November and December, 1961, about a dozen times. Louis Guido and Louis Vasselli would go into the bedroom and talk (A. 95). During the first week in November, 1961, she saw Louis Guido give her husband, Nick Guido, small money in exchange for large bills, such as one's, five's and ten's for one hundred bills. Mary Guido was also present (A. 95).

She further saw Louis Guido in his apartment around April 20 or 21, 1962, in the presence of Mary Guido and Nick Guido. "Louis Guido told my husband, Nick Guido, to be fair with Louis Vasselli because Louis Vasselli was one person that could cause him, Louis Guido, a lot of trouble. Nick Guido told his brother, Louis Guido, that

he had made all the money with him in the narcotics racket, so he should be responsible for and take care of Louis Vassell." (A. 95). (Motion for a mistrial was denied. A. 95).

On cross examination, Mrs. Pat Guido stated she was employed in 1960 in Joliet for about a year and that she was employed in 1961 until August. She was employed in 1962. With respect to her testimony that her husband, Nick Guido, gave one hundred dollar bills to Louis Guido in exchange for small bills during the first week in November, 1961, she was asked by defense counsel, "Where was Nick Guido employed, if he was, prior to November 1, 1961," "Did you give your husband Nick Guido any money?", "Did you ever give Nick Guido large bills?", "Nicholas Guido had no money prior to November 1, 1961, had he?", the court sustained government's objections to all such questions (A. 105).

Mrs. Pat Guido stated that Nick Guido had over $4,000.00 in fifty and one hundred dollar bills during the first week in November (A. 105). To the questions, "Where did he get the four thousand dollars?" and "Did he have the four thousand dollars on November 1, 1961?", the court sustained government objections (A. 106).

A series of questions pertaining to the $4,000—where it was obtained, where she saw it, whether she was with Nick Guido when he obtained it—were objected to by the government and the objections were sustained (A. 105, 106).

Mrs. Pat Guido testified that both Louis Guido and Mary Guido counted out the $800 in small bills. To the question, "What did Nick Guido do with the small bills?", "Did he keep this stack of eight hundred dollars in small bills?", "Did Nick Guido give you any of the money, the

small bills?", "Where did you go when you left the apartment?", the court sustained the government's objections (A. 107).

Mrs. Pat Guido further testified that Nick Guido put the $800 in her purse because they were too big to carry in his pocket. To the questions, "Where did you take the eight hundred dollars?", "Did you later take the money to a currency exchange or a bank?", "Did you later take the eight hundred dollars that was in your purse because it was too big for him to carry to a safe deposit box?" And "Did you pay bills with the eight hundred dollars in small bills?", the court sustained the government's objections (A. 108).

EVIDENCE PERTAINING TO THE OTHER DEFENDANTS.

One, Albert Spagnola, an inmate of Wisconsin State Penitentiary, serving a term for conspiracy to commit burglary, testified he met Louis Vasselli in the summer of 1960 in the company of Joe Micele (identified as Alex Micele). Louis Vasselli asked him if he would be interested in selling narcotics and the witness said he would think about it. He engaged in narcotic transactions with Louis Vasselli, August Delmonico, Alex Micele and Oscar Luna. He met one, Bernard Theisen, in a restaurant and Theisen asked him to get narcotics. He told Theisen he knew a couple of guys by the names of Micele and Vasselli, but that he had some trouble with them and did not want to get involved any more. He made phone calls to the number which Louis Vasselli had given him but he was unable to make contact for Theisen. He told Theisen that he was not able to reach Vasselli or Micele but that he had a friend by the name of Joe Gaynor and that he would be able to reach them through Joe Gaynor.

On cross examination he stated that he was buying and selling narcotics for just a few months and was not involved in any other transactions than those about which he testified. He was doing it mostly for a favor and only made $75.00 from the transactions. He did not know for a fact that whatever was in the packages was narcotics; and never knew whether the contents of the packages contained narcotics (A. 35).

Narcotic agent Bernard Theisen said he met Albert Spagnola on July 27, 1960 in a restaurant and that Spagnola stated he occasionally fooled around with narcotics and was doing business with two men on the southside of Chicago named Lou Vasselli and Miele. Theisen said he wanted to meet them and Spagnola gave him a telephone number with the name "Lou" written after it. Spagnola called several times without success. Spagnola made a number of phone calls subsequently for Theisen, but never reached Louis Vasselli.

One, Stanley Miller, testified he met Joseph Gaynor and Louis Vasselli in July, 1961, and purchased narcotics from them from July, 1961 to February, 1962. He sold the narcotics to different people, one of whom was defendant Al Sacko. He went to Al Sacko's apartment. One, Sam Jones was there. Jones wanted to buy narcotics, but Jones said he was broke. Sacko told the witness that they knew a lot of addicts in the neighborhood and that if they would get a free sample of the narcotics they would let the people use their apartment. He brought some stuff to Sacko's apartment and Sacko shot some stuff in Jones' arm and then shot some in his own arm. He left the package there for $200. The next day Sacko gave him $100, and the following day, $50. The next evening he got the balance of $50 and dropped off another package of white powder which he obtained from Louis

Vasselli and Joe Gaynor. He received $100, and then another $25 or $30, then Sacko said they could not make the payments because Jones was using up the stuff and they had no money. He tried to collect the money later from Sacko, but Sacko just never paid him again. Once, in November, 1961, he met Sacko and four other people in the vicinity of 18th and Halsted Streets and someone asked the witness for some stuff. Neither Sacko nor the others had any money and the witness said that Sacko owed him money, and that therefor they should get out of his car. (A. 73-75).

He knew the defendant James McGarry and saw him in November, 1961, in the vicinity of Archer and Canal Streets while he was on his way to Joe Gaynor's apartment. While he was talking to Joe Gaynor, Louis Vasselli walked out of a house carrying a black brief case. He got into a car with Joe Gaynor and Louis Vasselli. He saw Louis Vasselli give McGarry something, but he didn't know what (A. 76). Later, in December, he saw Louis Vasselli in a tavern. They saw McGarry pull into a gas station. McGarry handed Vasselli some money and Vasselli told Stein where he put the package of white powder; he saw McGarry get the package. A couple of weeks later, he was in another tavern and saw Louis Vasselli and Joe Gaynor. Louis Vasselli told him that McGarry and Joe Gaynor had an argument over Joe Gaynor's patting a woman on the behind. (A. 78). Later, Louis Vasselli gave the witness McGarry's phone number. He called McGarry, met him, and gave him $50 worth of white powder. Later in December, 1961, he called McGarry who told him he wanted some stuff but didn't have any money. The witness told him that he would let him know, but then never saw or spoke to McGarry again.

He saw Vasselli in December, 1961, and Vasselli had two rolls of money, one in each pocket. Vasselli said he had to drop off some money on Rush Street (A. 79).

He met one, William Olivanti, known to him as Viney in January, 1962 at 18th and Canal and sold Olivanti some white powder for $400. Later, he had another transaction with Viney and another man, known as Lover, for $400, of which he gave Louis Vasselli $200 and kept the other $200. A couple of weeks later he met Louis Vasselli and Gaynor, Louis Vasselli handed him two packages of white powder. About a week later he gave a sample to Viney. He learned in February, 1962, that Viney was Mr. Olivanti, a narcotics agent.

On cross examination the witness stated that he had no personal knowledge that the stuff in any of the packages contained heroin.

Clarence Cook, a narcotic agent, testified he met defendant McGarry on December 1, 1961, and was introduced by a special employee, William Blake. He bought a package from McGarry for $500, which package later proved to be narcotics (A. 87).

Narcotic agent William Olivanti testified he bought narcotics from Stanley Miller on January 4, 1962 and again on January 10, 1962. (A. 88-90).

Chemist John Andriz testified that Government exhibits 2A (a package bought by agent Cook from defendant McGarry), 3 and 3C (packages bought by agent Olivanti from Stanley Miller) contained narcotic drugs. (A. 90-91).

THE TRIAL COURT'S COMMENTS WITH RESPECT TO PETITIONER'S OBJECTIONS TO THE GOVERNMENT'S MOTION THAT ALL OF THE EVIDENCE AND ALL OF THE TESTIMONY OF ALL OF THE WITNESSES BE ADMITTED AS AGAINST ALL OF THE DEFENDANTS AS TO THE CONSPIRACY COUNT.

The defendant Guido objected to the admissibility into evidence of all of the testimony of all of the witnesses on the ground that there was no showing of any connection between him and the witness whose evidence was sought to be introduced against him. (A. 108).

The court asked the government attorneys to point out specifically wherein there was a *prima facie* case of conspiracy against Guido (A. 109). The prosecutor stated that witness Milazzo said that in July, 1960, Guido said to defendant Micele, "Let's get Frankie back in action." The court inquired if there was any evidence which showed who Frankie was, and whether there was any evidence to show what "in action" meant. The prosecutor answered, " . . . this is the logical inference that is proper to draw from the testimony of the witness Milazzo as to what action Mr. Micele was in at that time." (A. 109).

That prosecutor also stated that in April, 1962, in a conversation between Nick Guido and Louis Guido that Mrs. Patricia Guido testified she heard Nick Guido say that Louis Guido made all the money with Louis Vasselli in the narcotics racket (A. 109). The court stated, "Do you think a United States District Judge could send a man to the penitentiary on the basis of that statement?" (A. 109). The court inquired what that statement proved, stating, "Yes, some third person said that Guido made some money with Vasselli. Do you think that proves a conspiracy *prima facie*?" (A. 109).

The court further inquired of the prosecutor, "You don't have any physical evidence against Guido here yet?" (A. 109).

> "The Court: We have a statement by a third person that he made some money in the narcotics racket. Now suppose this case were to be concluded, suppose the Government were to rest at this moment. I don't know what other evidence they have,* but suppose the Government were to rest at this moment. Would you say that I was under obligation to submit the case as it applies to the defendant Guido to the jury?" (A. 109).

The prosecutor answered in the affirmative and the court stated, "You are going to have to show them (citations) to me because if some court has said this, some court whose decisions I am compelled to respect has said that I must submit a case like that—you know that is pretty thin evidence. Now I express no opinion about the weight of it, and I know that at this time I must resolve all intendments or inferences in favor of the Government, but to put a woman on the stand who says that her husband said, 'You made some money in the narcotics racket—' would you want to be sent to the penitentiary, Mr. Bailey, if somebody out in the hall said you took a bribe from a defendant in a case?" (A. 110).

* * *

"I am not expressing any opinion. I will give the government all the time it needs within the limits of proceeding with this trial to demonstrate to me that they have got Guido into this conspiracy . . . I express no opinion about it. We haven't got any money passing to Guido; we haven't had any conversations with him about narcotics. It is true that he was in the company of an alleged co-con-

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* The government presented no other evidence.

spirator, Mr. Vasselli. 'It isn't nice to keep bad company' is an old saying we have all heard. I don't know if Mr. Vasselli is nice company or not, but being in the company of a co-conspiratorial defendant, doesn't make him guilty of a conspiracy." (A. 110).

Referring to the testimony of Mrs. Pat Guido that Louis Vasselli was in defendant Louis Guido's apartment in November, 1961, and that they went into a bedroom outside the presence and hearing of the witness, the court inquired of the prosecutor, "But, do you think when a defendant in a criminal case goes into a bedroom with a man, or who is also a defendant in a criminal case, and nobody hears what the talk is about, that ties him with a conspiracy, except to prove that he is acquainted with him?" (A. 111).

Further, the court stated to the prosecutor, "You can't add up half a dozen or eight incidents, and I am not saying that is what occurred here, but the courts don't say you add up six or eight innocuous incidents and out of those make a totality that brings a man into a conspiracy." (A. 111).

(Notwithstanding these comments, the court overruled the objections of Guido and instructed the jury to consider all of the testimony of all of the witnesses against all of the defendants, except that part of Mrs. Pat Guido's testimony relating to an alleged conversation between Nick Guido and Louis Guido in April, 1962, and as to that conversation, the jury was instructed to consider it only as against the defendant Guido. A. 111).

EVIDENCE FOR THE DEFENDANT GUIDO.

Mary Skeva testified she was also known as Mary Guido. She knew Patricia and Nick Guido. In the month of November, 1961, she saw Nick and Patricia Guido together at the railroad station at Union Station. Patricia Guido's mother, her mother's future husband and Louis Guido were

at the station also. Before November, 1961, she did not see Nick and Patricia Guido together in the apartment she occupied with Louis Guido at 732 Bittersweet, Apt. 1406.

There were approximately 82 or 100 other apartments in the building. From the railroad depot they went to Louis Guido's apartment. No one else was present when they arrived and no one else came in. Louis Vasselli was not in the apartment. Nor did he come to the apartment when they were there. During the months of November and December, 1961, Nick and Pat Guido visited the witness and Louis Guido about ten times. She was always present. At no time that Nick and Pat Guido were there, was Louis Vasselli ever there. At no time in October or November, 1961, or at any time that Nick and Pat Guido came to the apartment, did she ever change small bills for big bills with Nick Guido, nor did she ever see Louis Guido do that. At no time in January, February, March or April, 1962, did she ever hear Nick Guido discuss Louis Vasselli with Louis Guido, nor did Nick Guido ever say to Louis Guido that Louise Guido was making money in narcotics with Louis Vasselli (A. 113).

She was 30 years of age, born in Chicago, attended high school and business college, was employed by DuPont Company as a secretary for Trans Canada Air Lines as a passenger agent, for MacFarland Advertising agency, the National Broadcasting Company, and for the North Advertising Company as a secretary (A. 113).

On cross examination she testified she first met Louis Vasselli in 1946 in the neighborhood where they lived. Since 1960, she saw him very seldom. She introduced Louis Guido to Louis Vasselli in August, 1960, in a restaurant, Cafe Milano's, in an area not far from the Club

LeFemme. Louis Vasselli came to her apartment on Bittersweet on only two occasions during the year 1961 and no one else was present other than herself and Louis Guido (A. 114).

Joseph Coduto testified he was government witness Frank Milazzo's first cousin and saw Milazzo a week or so before Christmas, 1962, at Milazzo's home. Frank Milazzo talked to him about the case. "Well, we were talking about the case. He (Milazzo) was telling me that when he went to the grand jury he lied. I asked him why. He told me he wanted to get out of prison. I asked him how it would help. How it would help him. He told me that he was promised a parole by the government, if he would testify, but he did not believe that and he did not trust them. If they would put him on parole, he would testify . . . . Well, we were talking and I was asking him if it was all true about him and Louis Guido and he told me, no, it was a lie. He never did nothing with the man." (A. 115).

Theodore Lawler testified he was an inmate of the Illinois State Pentientiary serving a sentence for robbery. From January, 1962, up to and including July, 1962, Frank Milazzo was his cellmate at Stateville Penitentiary and he saw Milazzo in the cell every day. They were in a cell, a small room about the size of a bathroom, about 20 hours a day, not counting when they went to eat. Milazzo told the witness that he had received visitors from the federal government. When Milazzo returned from the visit in about March, 1962, Milazzo said that he had something going for him and that he was going to get out. In July, 1962, Milazzo was packing his things and said that he was getting out. The witness told Milazzo to be careful and Milazzo said that he didn't care, that he was going to get out and that he didn't care what he had to do. "He says, 'I'm doing life. In fact,' he says, 'I got five life's,' he

said, 'and I have a chance to get out, and I'm taking advantage of it.'" The witness said Milazzo stated that if they (the government) would get him out he will go along with them, and if they did not, then he would not do anything for them. The witness said that nobody would believe him in the first place and that he would not be able to fool them and Milazzo replied, "I'm going to try. What have I got to lose? I got life." (A. 117-8).

SOME OF THE PROSECUTOR'S COMMENTS IN HIS ARGUMENT TO THE JURY

"Mr. James Bailey (Assistant United States Attorney): So Frank (Milazzo) chose the only right way, to come in before the Grand Jury, and to come in here before this court, and tell the truth, unless he would go back there for life." (A. 132).

"Mr. Echeles (defense Attorney): If the Court please, I object. We asked for the Grand Jury minutes, and I was refused it over the objection of the prosecutor. I think it is improper for him to state what this man testified before the Grand Jury, when we were denied his testimony before the Grand Jury.

The Court: I will overrule your objection, Mr. Echeles.

Mr. J. Bailey: That is what Frankie did. Frankie told the truth, and he took that stand. . . ." (A. 132).

Mr. J. Bailey: "Frankie was faced with a choice: spend his life in prison, or testify and tell the truth. Frankie chose the right one, for the first time in his life. . . . (A. 132)

REASONS FOR ALLOWANCE OF THE WRIT

1.

The conspiracy charge against petitioner was not proven.

To be convicted upon insufficient evidence is the most flagrant violation of a citizen's right to due process of law: *Garner* v. *Louisiana*, 368 U.S. 157 (1961).

Taking the government's case against the petitioner as true, the totality of evidence against him is wholly insufficient to prove the charge of conspiracy. There was no other charge against the defendant.

The trial judge had considerable misgivings about allowing the acts and declarations of others outside the presence of the petitioner to be considered by the jury in connection with the petitioner (A. 169-111).

But he so allowed; even though "there must be independent evidence establishing a defendant's participation in the conspiracy before such (hearsay) declarations are admissible against him." *United States* v. *Bentvena*, 319 F.2d 916, 949 (2d Cir. 1962). Also, *Glasser* v. *United States*, 315 U.S. 60, 74-75, 62 S.Ct. 457, 68 L.Ed 680 (1942); *United States* v. *Consolidated Laundries Corp.* 291 F.2d 563, 576, (2 Cir. 1961); *United States* v. *Stromberg*, 268 F.2d 256; 265-67 (2 Cir. 1959). A defendant's "participation in the conspiracy which the government sought to prove can be established only by proof, properly admitted into evidence, of their own words and deeds." *United States* v. *Russano*, 257 F.2d 712, 713, (2 Cir., 1958) and such independent proof must be substantial and not "too slight" *United States* v. *Consolidated Laundries Corp.*, *supra*.

The Court of Appeals' Opinion (Appendix A, p. 2) found that after co-defendant Micele and one D'Agostino discussed with government witness Frank Milazzo an opportunity to pass the stuff (meaning narcotics) that "both took him to meet Guido." The record shows (A. 38) that Micele took Milazzo to the Club LeFemme where Milazzo *accidently* ran into petitioner. It is nowhere the testimony that Micele took Milazzo to the Club Le Femme for the purpose of meeting Guido.

The Appellate Court also stated that on an occasion, Guido told Milazzo that Micele and D'Agostino owed him money. There was no testimony from Milazzo, or from anyone else, what the money was owed for. It could have been a gambling debt, said Milazzo (A. 67). The Court of Appeals stated that ". . . later Micele left money at a night club for Guido." (Opinion, Appendix A, p. 2). The record shows that Milazzo testified that Micele said he was going to a night club to leave $1125 for "Lou" and that Micele left $1125 at the Club LeFemme with someone for a "Lou" (A. 46). Milazzo further testified he could not say the money was left for Guido; it might have been left for two other persons known as "Lou" or "Louis" (A. 67.) Not even the trial court concluded that petitioner received any money. In commenting on petitioner's motion at the close of the government's case, the trial court, in speaking to the prosecutors, stated, "We haven't got any money passing to Guido; we haven't had any conversations with him about narcotics" (A. 110).

The Court of Appeals found ". . . that Guido indicated to Milazzo that Micele and Guido were partners." (Opinion, Appendix A, p. 2). Although such was the government's theory which the reviewing court adopted, such theory is not supported by the record. The reference to

"partners" appears at p. 47 of the Appendix and p. 272 of the original Record. It shows that Milazzo said he saw Guido at the Club LeFemme some time in October, 1960 and no one else was present. "He (Guido) asked if Alex (Micele) had discussed with me, told me about us being partners. I told him no, Alex didn't say anything to me, and I walked off." The pronoun references are unmistakable. Milazzo's testimony on this score cannot properly be interpreted to mean that Guido indicated that Micele and Guido were partners; but only an inquiry by Guido to Milazzo as to whether Micele said anything to Milazzo about Milazzo and Micele being partners. And cross examination of Milazzo as to what the reference to "partners" could mean was cut off by government's objections. A. 64. Counsel for petitioner put questions to government witness Milazzo designed to show that Milazzo was a partner with defendant Alex Micele in the commission of robberies. (A. 4).

"An accumulation of nothings is still nothing."

In *Reiss* v. *United States*, 324 F.2d 680, 685, 1 Cir. (1963), the court stated:

> "With respect to him (one of the defendants) the government does no more than list a number of presumptively innocent actions. Unless such actions are in some way related so that they reflect upon each other, an accumulation of nothings is still nothing. Conspiracy cannot be establish by mere 'inferences no more valid than others equally supported by reason and experience' *United States* v. *Bufalino*, 2 Cir. 1960, 285 F.2d 408, 419."

The trenchant remarks in the now famous "Apalachian" cases, are appropriate here. In *United States* v. *Bufalino*, 2 Cir. 285 F.2d 408, the court stated, p. 418:

> "We doubt the advisability of requiring that the government meet any absolute standards in conspiracy cases. At the same time we cannot state too strongly our view that it is incumbent on trial judges, in deciding whether the government has made out a sufficient case to go to the jury, to analyze with meticulous care the evidence as to each defendant. When this is not done, it is the duty of the appellate courts to act. Cases such as this prove all too well the need for the caution which from time to time has been articulated by the Supreme Court with respect to the indiscriminate indictment of numerous defendants in conspiracy cases. What Mr. Justice Jackson, joined by Justices Frankfurter and Murphy, warned against in his concurrence in *Krulewitch* v. *United States*, 1949, 336 U.S. 440, 449-454, 69 S.Ct. 716, 93 L.Ed. 790, anticipates the disturbing features of this case. See also *Yates* v. *United States*, 1957, 354 U.S. 298, 330, n. 36, 77 S.Ct. 1064, 1 L.Ed. 2d 1356."

When government witness Miller was testifying (A. 72-77) he referred to transactions between himself and defendant McGarry, between himself and defendant Sakal, between himself and Joe Gaynor and Louis Vassefli. But nothing about Guido. Counsel for Guido objected previously; and finally, the trial court remarked, "Now Mr. Bailey (the assistant United States Attorney prosecuting the case) you assured me after Mr. Echeles first objected that you would connect this witness' testimony with Mr. Guido, defendant Guido. I have not heard anything yet." (Appendix 77). Although the prosecutor assured the court that he would connect up the testimony with Guido, there was never any mention of Guido nor was there any evidence connecting Guido with that testimony. Petitioner

moved that Miller's testimony be stricken as to him and that the jury be so instructed. The trial court denied the motion (A. 80); notwithstanding its promise to deal with an appropriate motion of the defendant in the event the government did not connect up Miller's testimony with petitioner (A. 77).

At the conclusion of the prosecution's case, the government moved for the admittance into evidence against each defendant of all acts and declarations of all defendants. The trial court expressed considerable dubiety about the sufficiency of evidence against petitioner (A. 109, 110, 111), and asked the government to point out where a *prima facie* case was made against petitioner.

When the prosecutor replied that witness Milazzo said that in July, 1960, Guido said, "Let's get Frankie back in action", the court inquired if there was any evidence to show who Frankie was and whether there was any evidence to show what "in action" meant (A. 109). The prosecutor's answer was that, ". . . this is the logical inference that is proper to draw from the testimony of the witness Milazzo as to what action Mr. Miceli was in at that time." (A. 109).

The prosecutor also replied that in April, 1962, Mrs. Pat Guido heard her husband Nick Guido say that Louis Guido made all the money with Louis Vasselli in the narcotics racket (A. 109). The court remarked, "Do you think a United States District Judge could send a man to the penitentiary on the basis of that statement?" (A. 109). (Guido is serving ten years in the penitentiary). The court inquired what that statement proved, stating, "Yes, some third person said that Guido made some money with Vasselli. Do you think that proves a conspiracy *prima facie*?" (A. 109).

And further the court inquired of the prosecutor, "You don't have any physical evidence against Guido here yet?" . . . We have a statement by a third person that he made some money in the narcotics racket. Now supposing this case were to be concluded. Supposing the government were to rest at this moment.* I don't know what other evidence they have. But supposing the government were to rest at this moment. Would you say that I was under obligation to submit the case as it applied to the defendant Guido to the jury?" (A. 109).

The court concluded, ". . . We haven't got any money passing to Guido; we haven't had any conversation about narcotics. It is true that he was in the company of an alleged co-conspirator, Mr. Vasselli. It isn't nice to keep bad company is an old saying we have all heard. I don't know if Mr. Vasselli is nice company or not, but being in the company of a co-conspiratorial defendant, doesn't make him guilty of a conspiracy." (A. 110).

Referring to the testimony of Mrs. Pat Guido that Louis Vasselli was in defendant Louis Guido's apartment in November, 1961, and that they went into a bedroom outside the presence and hearing of the witness Pat Guido, the court inquired of the prosecutor, "But, do you think when a defendant in a criminal case goes into a bedroom with a man who later, or who is also a defendant in a criminal case, and nobody hears what the talk was about, that ties in with the conspiracy, except to prove he is acquainted with him?" (A. 111).

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* The government did rest without the introduction of any further evidence.

And further, the court stated to the prosecutor, "You can't add up half a dozen or eight incidents, and I am not saying that is what occurred here, but the courts don't say you add up six or eight innocuous incidents[2] and out of those make a totality that brings a man into a conspiracy." (A. 111).

In *Glover* v. *United States*, 306 F.2d 594, the Tenth Circuit reversed a conviction of conspiracy to import narcotics on evidence stronger against the appellant there than against petitioner here. In reviewing the evidence, the court stated, p. 595:

> "Statements made by Irvin, incriminating Glover were not admissible against Glover because they were not made in his presence and hearing and the government had not established by independent evidence the existence of a conspiracy between him and Irvin.
>
> "To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established by independent evidence. The existence of the conspiracy cannot be established against an alleged conspirator by evidence of acts or declarations of his alleged co-conspirators, done or made in his absence.
>
> "While the evidence may have been sufficient to cast suspicion upon Glover, that was not enough. Evidence which creates a mere suspicion of guilt is not enough. Guilt may not be inferred from mere association."

See also *United States* v. *Cianchetti*, 2 Cir. 315 F.2d 584 (1963); *United States* v. *Eng*., 2 Cir. 241 F.2d 157; and *Panci* v. *United States*, 5 Cir. 256 F.2d 308, all cases reversing convictions for conspiracy to violate narcotic laws.

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[2] "An accumulation of nothings is still nothing." *Reiss* v. *United States*, 324 F.2d 680, 685, 1 Cir., 1963.

It is not shown anywhere in the record that Guido had guilty knowledge of the existence of any conspiracy to violate the narcotic laws. And without that knowledge, the intent to participate in an established conspiracy cannot exist, and "... to establish the intent, the evidence of knowledge must be clear, not equivocal." *Ingram v. United States*, 360 U.S. 672, 680.

Where the trial court expressed doubts about the sufficiency of evidence with respect to petitioner, but nonetheless refused to direct a verdict of acquittal, it is not surprising that a jury would convict in a conspiracy narcotic prosecution. We believe we have demonstrated how the Court of Appeals' conclusions regarding the "facts" against petitioner were deflected by the government's wrongful theory presentation of those "facts". (See *infra*, pp. 25-26).

In the exercise of responsible and considered advocacy we ask for the grant of certiorari to review what we respectfully submit is an obvious and terrifying injustice to a person convicted on such unsubstantial evidence as here and sentenced to ten years in the penitentiary.

The frequency with which narcotics conspiracy prosecutions are brought in the federal courts tends to jade the observer and to intensify the image of the alleged offender as an enemy of society. In this climate, it is perhaps not surprising that certain rules of convenience have been adopted to streamline such prosecutions.

History is not lacking in precedent for judicial determinations influenced by popular revulsion toward the nature of the accusations.

The prevalent attitude is that if a given quantum of evidence which represents, as here, all that is reasonably available in support of a prosecution under the narcotics statute, it must necessarily be enough to convict. Otherwise, the unspoken argument concludes, the defendant might be acquitted.

If this analysis seems harsh, considering the record before your Honors, it seems also unfortunately to be accurate.[3]

2.

Taking the government's case at its best, there were separate conspiracies a la Kotteakos v. United States, 328 U.S. 750.

Of nineteen defendants, five stood trial together. (Guido moved for a severance before trial, which motion was denied. A. 3, 4). The government presented evidence against each of the defendants on trial, notwithstanding that there was no connection shown between all the defendants. The purpose of the government was deliberately to prejudice Guido in his right to a fair trial.

The only tangible narcotics introduced into evidence, which exhibits went to the jury, were evidences of a sale of narcotics by defendant McGarry to narcotic agent Cook in December, 1961 (A. 86). Cook was introduced to McGarry by a special employee, William Blake (A. 85). No connection was shown between the individuals in this transaction and Guido. A narcotic agent, Olivanti, testified he bought narcotics from government witness Stanley Miller on two occasions in January, 1962 (A. 89). The

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[3] Cf. Development in the Law: Criminal Conspiracy, 72 Harv. L.Rev. 920-980-83 1953; Note, The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276, 284 (1948).

packages of narcotics were introduced into evidence over defendant's objections (A. 90). No connection was shown with Guido.

Miller was set out in the indictment as a co-conspirator non-defendant (A. 1). His testimony was to the effect that he had dealings with Louis Vasselli and Joseph Gaynor (named defendants in the indictment, but not on trial). It was Miller's claim that he received narcotics from either Vasselli or Gaynor between July, 1961 and February, 1962, and that he sold the narcotics to different people, one of whom was the defendant, Al Sacko (A. 73 to 79).

There is not a word of evidence in the entire record from any narcotic agent, from government witness Miller, or any other person that Guido had anything to do with agents Cook or Olivanti, witness Miller, defendant McGarry or defendant Sacko. Yet evidence of offenses allegedly committed by Miller, Sacko and McGarry were permitted to be considered by the jury against Guido, over his objections (A. 73 and 80).

Not only was the evidence that Miller gave against himself, Sacko and McGarry prejudicial to Guido, but it established that, if anything, separate conspiracies were here afoot. Such separate conspiracies may not be joined in one action to confuse and confound the issues to the prejudice of the defendant.

Apparently, it was the government's theory that because Louis Vasselli was a man who gave narcotics to Stanley Miller between July, 1961 and January, 1962 and because defendant McGarry was seen by Miller to have a transaction with Louis Vasselli, and because Sacko is alleged by Miller to have received narcotics from him (Miller), and because McGarry sold narcotics to agent Cook, and because Miller sold narcotics to agent Olivanti, that therefore

all of such testimony should be considered against Guido because Louis Vasselli visited Guido's apartment in November, 1961. The only other testimony touching Louis Guido in connection with Louis Vasselli is the fact that Louis Vasselli was the manager of a night club in Chicago, the Club LeFemme, and that Louis Guido was sometimes a patron in the tavern, along with hundreds of other patrons.

The facts here are remarkably similar to those in *Kotteakos* v. *United States*, 328 U.S. 750, where your Honors held that the government proved not one conspiracy but eight or more different ones of the same sort executed through a common figure, Simon Brown (p. 752). Here, the "common key figure" was Louis Vasselli, according to the government's theory. But even taking that theory, there is nothing shown that Louis Guido participated in any narcotic transaction. Even if it be concluded that he had, by the piling of inference upon inference and guess interpretation upon guess interpretation, the government only made out separate conspiracies.

For what is shown between Guido and Sacko? Between Guido and McGarry? Between Guido and Miller? Between Guido and Spagnola? Or between Guido and Pellegrini?

Nothing.

Nothing at all.

All that was shown was that Louis Guido met with Miccle and government witness Frank Milazzo at the Club LeFemme accidentally on several occasions between July and October, 1960. No mention of narcotics with Guido, no passing of narcotics from or to Guido, no passage of money from or to Guido for narcotics.

What else is present? A bald statement by Mrs. Pat Guido, wife of Nick Guido that in April, 1962, Nick Guido told Louis Guido that he, Louis, had made all the money with Louis Vasselli in the narcotics racket so Louis Guido should be responsible for and take care of Louis Vasselli (A. 95).

Your Honors stated in *Kotteakos*, p. 755:

> "The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment. (citing cases) The Court of Appeals aptly drew analogy in the comment, 'thieves who dispose of their loot to a single receiver—a single "fence"—do not by that fact alone become confederates: They may, but it takes more than knowledge that he is a "fence" to make them such.' 151 F. 2d at 173."

Under the circumstances of this case, where, for example, packets of narcotics were introduced into evidence and sent to the jury, which packets had nothing to do with Guido, the prejudice to him is great. As it was said in *Kotteakos*, p. 764:

> "In criminal cases the outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen, and the question is not were they right in their judgment regardless of the error or its effect upon the verdict. It is rather what effect the error had, or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."

The Second Circuit reversed a conviction for conspiracy to traffic in narcotics where the evidence established two separate conspiracies. *United States v. Russano*, 257 F. 2d 712 (1958). There, the same appellants en-

gaged in certain dealings in narcotics in 1952, and then, after a lapse engaged again in dealings in narcotics in 1955 and 1956. The government charged a continuing conspiracy from 1951 to 1957. Even though the court assumed that the properly admitted evidence at the trial would suffice to establish an offense of conspiracy in 1952 and the separate offense of conspiracy in the years 1955-1956, the court reversed for the reason that evidence regarding the appellant's activities in the latter years should not have been introduced as affecting the consideration of their activities in 1952, and accordingly, the court reversed and remanded.

3.

The instruction in Crawford v. United States, 212 U.S. 183 that testimony of a felon, who is also a confessed accomplice, should be received with the very greatest care and caution was refused.

The chief government witness against petitioner was one, Frank Milazzo (A. 38-73). The government brought out the fact that Milazzo was convicted of four felonies for armed robbery (A. 38). On cross examination he admitted to having been convicted of a total of eight felonies (A. 63). He was serving a life sentence in the Illinois State Penitentiary when he was released on parole through the intercession of federal officials in charge of the prosecution of this case (A. 56). He also testified that under certain circumstances he would lie to save himself (A. 57).

The witness had made it as a condition of his testimony in court that he be released on parole *before he would give any testimony* (A. 63).

Under the circumstances then, petitioner objected to the government's offered accomplice instruction and instead, tendered one in accordance with the holding by this court

in *Crawford v. United States*, 212 U.S. 183, p. 204. It was refused. The Court of Appeals approved the instruction as given by the trial court to the effect that ". . . the testimony of an accomplice witness, is to be received with caution, and weighed with great care." (Appendix A, p. 7).

Although so requested, the trial court gave no instruction to the jury advising them to consider the fact that a witness had a prior felony record as bearing upon the credibility of that witness. The defense requested of the trial court to instruct the jury that, ". . . where an accomplice is also an admitted felon, you must treat the testimony with even greater suspicion and you must act upon it with even greater hesitation." (A. 130, 141). The defendant objected to the refusal by the court to give any instruction to the jury with respect to the testimony of one who had previously been convicted of a felony (A. 141). *Crawford v. United States, supra,* was specifically called to the trial court's attention and cited to the reviewing court. The appellate court stated that, "The given instruction is not altogether as strict as the court in *Crawford v. United States*, 212 U.S. 183, 204 (1909), implies an instruction under such circumstances ought to be. On the other hand, it does not fall so short of the mark as to be reversible error because on the whole record we are not of the opinion that the failure to give the *Crawford* instruction prejudiced defendants. *Id.* at 204." (Appendix A, p. 7)

In *Crawford*, at 203, 204, the rule was laid down as follows:

> "But a felon, being also a confessed accomplice, was thus produced by the government as a witness for the purpose of proving its case against defendant . . . Without his evidence it would have been difficult, if not impossible, to convict the defendant . . . But the

evidence of a witness, situated as was Lorenz is not to be taken as that of an ordinary witness of good character in a case, whose testimony is generally and *prima facie* supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses."

Failure to give the *Crayford* instruction "on the whole record" here was highly prejudicial to the petitioner. The accomplice instruction as given did not cover the factual situation of Milazzo's demonstrated felony record. "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross examination and to have the issues submitted to the jury with careful instructions." *On Lee v. United States*, 343 U.S. 747, 757, 72 S.Ct. 967, 69 L.Ed. 1270.

4.

It was error for the trial court to rehabilitate the government's chief witness by striking his answer that his testimony before the grand jury on the first occasion of his appearance was different from his testimony at the trial.

An instruction by the court to the jury to the effect that the credibility of a witness may be attacked by showing he made prior inconsistent statements (A. 140) was rendered meaningless.

Government witness Milazzo appeared before the grand jury on four separate occasions (A. 31). When he was asked on cross examination "Well, on the first date that

you appeared before the grand jury, did you deny your participation in any of these activities?'' The witness said, ''Yes, I did.'' (A. 51). Upon the government's motion the court struck the answer and directed the jury to disregard it (A. 51). The trial court sustained a government objection to the question, ''Did you tell the same story before the grand jury on the first time that you appeared as you told on the witness stand?'' (A. 51).

In view of the witness' answer that he denied his participation in any of these activities the first time he appeared before the grand jury, petitioner's counsel attempted to elicit some information regarding what went on before the grand jury by asking the following questions.

> ''Did you add things as you went along in your testimony before the grand jury?''
>
> ''How long were you before the grand jury on the first occasion?''
>
> (The witness' answer, ''About a half a day'' was stricken on government motion).
>
> ''How long were you before the grand jury on the second occasion?''
>
> ''On the third occasion?''
>
> ''On the fourth occasion?'' (A. 53).

Government objections were sustained. (A. 53).

Thus, it is clear that on cross examination Milazzo impeached himself by stating he denied his participation in any of these activities on the first date when he appeared before the grand jury (A. 51). True, later in his testimony, 130 pages of transcript later (A. 72), he changed his testimony and stated that on the first three occasions before the grand jury he did not testify; and that after he appeared before the grand jury for the fourth time he had not yet been released on parole (A. 72).

But, without any legal justification the court struck the answer of the witness that he denied his participation in these activities on the first date he appeared before the grand jury (A. 51). Accordingly, the court took away an important consideration from the jury: their consideration that on a former occasion the witness gave inconsistent testimony. The court did instruct the jury that one method of impeaching a witness was to show he made a prior statement inconsistent with his testimony (A. 140). But because the court foreclosed the jury from considering the contrary testimony of Milazzo during the trial, the instruction was equivocal and, therefore, erroneous. *Bollenbach* v. *United States*, 326 U.S. 607, 613.

5.

Where there are admitted inconsistencies between grand jury and trial testimony of the government's chief witness, should not defense counsel be permitted use of grand jury minutes to cross examine under circumstances such as here?

The decision of the Seventh Circuit in denying the petitioner access to the grand jury minutes for purposes of impeachment under circumstances such as here is in apparent conflict with the holdings of the Second Circuit on the same matter. This is an important question of law in an area in which the applicable decisions are not clear.

A clear 'particularized need' was established to require an examination of the grand jury minutes. *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, 79 S.Ct. 1238, 3 L.Ed. 1323 (1959); *United States* v. *Procter and Gamble*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed. 2d 1077 (1958).

When it was clearly demonstrated that the witness Milazzo would not testify for the government until he was first assured of his own release from a state penitentiary sentence (A. 51, 56) and when the witness testified he first denied his participation in any of the events of his testimony to the FBI agents (A. 51), and when the witness testified he denied his participation in any of these activities on the first date he appeared before the grand jury (A. 51) demand was made for the grand jury minutes (A. 52). The trial court refused to examine the grand jury minutes *in camera* and refused to turn over the minutes to the defense (A. 52).

The Court of Appeals opined that a "particularized need" had been demonstrated for an examination *in camera* of the grand jury testimony. After oral arguments, but before the decision by the Court of Appeals, the reviewing court ordered the trial judge to examine the grand jury testimony *in camera* for possible inconsistencies and to certify both the grand jury and his opinion to the Court of Appeals (Opinion, Appendix A, p. 7). The Court of Appeals stated, Appendix A, p. 8:

> "We have read the grand jury testimony of Milazzo and Miller and agree with the trial judge that no material inconsistencies appear. Their testimony at the trial may be more expansive, but on the whole we see no inconsistencies, and we cannot see that denial of *in camera* examination and use of the grand jury testimony to impeach was prejudicial."

Of course, the traditional need for secrecy of the grand jury testimony no longer existed. Just as Milazzo's statements were turned over to the defense in accordance with *Jencks* v. *United States*, 335 U.S. 657, 77 S.Ct. 1007, 1 L.Ed. 2d 1103 and in accordance with Section 3500, Title 18, U.S. Code, the minutes of Milazzo's grand jury testimony should

have been turned over to the defense for use in cross examination. The determination by both the trial and the appellate court that "no material" inconsistencies appear demonstrates that there were some inconsistencies. When the Court of Appeals stated that the testimony of Milazzo at the trial may have been "more expansive", the defendant should be given access to the grand jury minutes in order that counsel may have that important tool for cross examination. The subtle nuances of differences may be more attractive to a cross examiner who may have other facts with which to cross examine which may fit the discrepancies to his theory of cross examination than to a court determining that "on the whole" there appeared to be no "material inconsistencies"

The Second Circuit in *United States* v. *Zborowski*, 271 F.2d 661 at 665 and *United States* v. *Hernandez*, 290 F.2d 68 at 88-89 suggests that defense counsel be permitted such access to the grand jury minutes of a witness as bears upon his testimony under such circumstances as here.

In *Gordan* v. *United States*, D.C. Cir. 299 F.2d 117, where the government's case hung ". . . by a single thread, the testimony of one police officer. . ." (and here by the single witness Milazzo) the court stated, p. 118:

> "Whatever invasion of the historic sanctity of grand jury proceedings such examination may cause, if any, seems to us outweighed by the additional certainty this procedure will lend to the process of verifying as credible the uncorroborated testimony of a sole witness for the government."

In discussing the traditional reasons for keeping the grand jury proceedings secret, the District of Columbia Circuit stated in *Simmons* v. *United States*, 308 F.2d 324, that there were four reasons generally: (1) to prevent

the accused from escaping; (2) to prevent disclosure of derogatory information against an accused who has not been indicted; (3) to encourage witnesses to come before the grand jury without fear that this testimony would be made public (4) to encourage an uninhibited grand juror's deliberation.

None of these reasons is remotely applicable in the instant case. For here was only sought the inconsistent testimony of Milazzo who appeared in open court. (*Cf.* 48 Cal. L. Rev. 1960, and 284 Am. Jur. Grand Jury, 47 (1939).

If the "particularized need" rule is to have any efficacy, the burdens to defense counsel ought not to be insurmountable.

Your Honors ought to grant the writ in order to determine whether, under circumstances such as here demonstrated, defense counsel should be permitted access to the grand jury minutes for the purposes of cross examination; much as your Honors have decided that the statements of government witnesses be turned over to defense counsel in order that counsel themselves may determine any possible inconsistencies and in order to predicate questions on cross examination

6.

Where the defense was denied access to the grand jury minutes, and where the prosecutor, of course, has such access, does it not offend essential fairness to permit the prosecutor to advise the jury in closing argument that the witness in question told the truth before the grand jury; especially when the witness testified he did not tell the truth before the grand jury?

When the chief government witness against the petitioner testified he denied his participation in these activities when he first appeared before the grand jury (A.

51), upon government motion the trial judge struck the answer, thus taking away from the jury's consideration its evaluation of a possible inconsistency. When the case went to the jury, so far as it was concerned, nothing appeared in evidence with respect to the truth or falsity of Milazzo's grand jury testimony. Yet, the prosecutor used the high office of the United States Attorney to tell the jury that Milazzo told the truth before the grand jury (A. 132). Defense objection to the prosecutor's unwarranted statement was overruled (A. 132).

The decision of the Court of Appeals was silent on this claimed error. The First Circuit Court of Appeals reversed a conviction under similar circumstances. *Greenberg v. United States*, 280 F.2d 472, wherein the court stated, p. 475:

> "To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has advantage of official backing."

Under the circumstances, the prejudice to petitioner could not be greater

7.

Our system of criminal procedure being adversarial in nature, the right of cross examination is paramount to a fair trial. A limitation on this right is a violation of due process of law.

Limitation of cross examination requires reversal. *Alford v. United States*, 282 U.S. 687. The companion rule is that each case depends upon the particular limitation therein involved.

The limitation of cross examination here gave the government an unfair advantage in arguing inferences from Milazzo's testimony. Milazzo testified on the government's direct examination that at one time when he met petitioner at a night club: "He (Guido) asked if Alex. (defendant Miecle) had discussed with, told me about us being partners. I told him no, Alex didn't say anything to me, and I walked off." (A. 47).

Prior testimony by Milazzo showed that Milazzo had narcotic transactions with Miecle. The purpose of the government's eliciting this testimony was to argue to the jury that a reasonable inference was that petitioner asked if Miecle discussed with the witness about being "partners" in narcotics.

On cross-examination by petitioner's counsel, Milazzo was asked, "Were you ever partners with Miecle in any other criminal enterprises?" "You were a partner with Alex Miecle in the commission of armed robberies, were you not?" (A. 64). Both government counsel and counsel for Miecle objected. The court sustained the objections and admonished petitioner's counsel not to ask that type of question.

Petitioner's counsel made an offer of proof outside the presence of the jury to the effect that inquiry from Milazzo would show that the partnership acts engaged in by the witness Milazzo and defendant Miecle were robbery and burglary actions—never narcotic actions; and that there was never any discussion between petitioner and the witness about narcotics; that it would be shown upon questioning of Milazzo that he was a partner of Miecle in robberies and that Milazzo and Miecle were convicted together for robbery and that the type of "acts" the witness Milazzo and defendant Miecle engaged in during the period of alleged narcotic activity was in fact robbery and burglary acts (A. 65)

In a case as tenuous as this on the facts against petitioner, the government sought and obtained the advantage of all inferences from veiled suggestions and innuendoes. Defense was not even permitted to obtain legitimate testimony to counter the arguable inference. The government made up in surmise and conjecture, upon limitation of cross examination, for non-existent facts and evidence.

The same type of limitation occurred with the government witness Mrs. Patricia Guido. She was the wife of Nick Guido, petitioner's brother. On the government's direct examination she said petitioner exchanged $800 in small bills—ones, fives and tens—for large ones with her husband.

On cross examination she stated that her husband Nick Guido, possessed over $4,000 in $50 and $100 bills during the first week in November, 1961. Accordingly, it was important for the jury to learn when, where and how Nick Guido obtained this money (if he did, at all) inasmuch as he was just released from the Federal penitentiary on November 1, 1961 (A 112). The defense tried to find out a little something about the alleged possession by Nick Guido of a large quantity of big bills. And so Mrs. Pat Guido was asked, "Did you give your husband, Nick Guido any money?" "Did you ever give Nick Guido large bills?", "Nickolas Guido had no money prior to November 1, 1961, had he?" To all these questions the court sustained government's objections (A 105).

To the questions, "Where did he get the $4,000?" and "Did he have the $4,000 on November 1, 1961?", the court sustained government objections. A whole series of questions pertaining to the $4,000 with respect to where it was obtained, where she first saw it, whether she was with Nick Guido when he obtained it, were all objected to by the government and the objections were sustained (A 106,

107). Accordingly, the court foreclosed the defendant in his right to cross examine the government witness in an area which the government felt important to its case.

Government witness Pat Guido testified that both Louis Guido and Mary Guido counted out the $800 in small bills. The court limited the defendant extremely in asking any questions with respect to this $800. To the questions, "What did Nick Guido do with the small bills?", "Did he keep this stack of $800 in small bills?", "Did Nick Guido give you any of the money, the small bills?", "Where did you go when you left the apartment?", the court sustained all of the government's objections (A 107).

Mrs. Pat Guido gave a little air of verisimilitude to the alleged transaction with respect to $800 for she said that she put the $800 in her purse because they were too thick to carry in Nick Guido's pocket (A. 108). The defense proposed to find out a little something about what happened to the $800 in order to aid the jury in its determination of whether or not it should believe Mrs. Pat Guido, and some pertinent and relevant questions were asked in this connection, such as, "Where did you take the $800?", "Did you later take the money to a currency exchange or a bank?", "Did you later take the $800 that was in your purse because it was too big for him to carry to a safety deposit box?", "Did you pay your bills with the $800 in small bills", but the jury was not permitted to follow the course of the $800. The court sustained every one of the government's objections to each one of the questions (A. 108).

Although the court permitted the questioning of Mrs. Pat Guido with respect to her employment in 1960 and until August, 1961, the court foreclosed any cross examination with respect to Mrs. Pat Guido's employment in 1962. We made an offer of proof that if we were permitted to inquire of Mrs. Pat Guido that it would be proved that her

employment in 1962 consisted of casing houses for prospective robberies and in driving the get-away cars at the conclusion of robberies (A. 100). So that the jury had before it only the fact that Mrs. Pat Guido was legitimately gainfully employed in 1960 and 1961, but did not have before it the fact that she was employed in felonious enterprises from August, 1961 until her arrest in June, 1962.

Was it not an abuse of discretion to limit the cross examination of the witness Pat Guido? Had petitioner been permitted to pursue the matter of the money it is possible the falsity of her testimony could have been demonstrated.

Under all of the facts and circumstances of this case and under the extremely limited restriction placed upon defense counsel in cross examining Mrs. Pat Guido we respectfully submit this court should grant the writ to determine whether the limitation of cross examination was an abuse of the court's discretion.

8.

It was an abuse of the trial court's discretion to deny petitioner's motion for a bill of particulars. It is not clear under the decisions when such request is required to be allowed.

Although there were 49 counts in the indictment, Guido was charged only in count 1, the conspiracy count, which charged that from January, 1960 to October 4, 1962, the date of the return of the indictment, that the defendant conspired with 32 other individuals to import narcotics contrary to law (A. 1). The indictment set out 24 alleged overt acts, in which Guido was mentioned once, in paragraph 4 thereof, to the effect that, "During or about the month of September, 1960 the defendant Louis Guido had a conversation with co-conspirator Frank Milazzo in the LeFemme Club in Chicago, Illinois." In the whole of the rest of the 24 page indictment, Guido is not mentioned once.

The defendant surrendered himself on November 15, 1962 (A. 142), and was arraigned on November 19, 1962. (A. 1). At the arraignment, he was given 10 days only within which to file such motions as pertained to the indictment.

On November 30, the defendant filed his motion for a bill of particulars alleging that the conspiracy count was couched in vague and indefinite language and that he was not properly apprised of the nature and cause of the accusation. (A. 2, 3).

The motion addressed itself to the request for certain information necessary to enable the defendant to prepare his defense. The indictment certainly did not sufficiently serve this purpose. Petitioner did not request that the government advise him of the manner by which it intended to prove its case; nor did he want a full dress rehearsal of the prosecutor's case in advance of the trial.

Guido was nowhere charged in any of the 18 succeeding substantive counts, which named a number of other co-defendants. He was not apprised anywhere in the indictment when, where and with whom he was supposed to have participated in the alleged offenses. Under such circumstances then, it is required that a bill of particulars be furnished, at least as to the dates and places wherein the defendant conspired and with whom. *United States* v. *Williams*, 9 Cir. 289 F.2d 598, 600-601; *Rodella* v. *United States*, 9 Cir. 283 F.2d 306, 310.

We submit the writ should be granted to determine, if possible, what circumstances in a case require that a request for particulars be honored.

9.

Petitioner was not granted the right to review of his claimed error that the court instructed the jury improperly on an essential element of the crime.

It was nowhere shown that petitioner ever possessed any narcotics. Nor is there a hint in the record that he received, concealed, bought, sold or in any manner facilitated the transportation, concealment or sale of any narcotic drug.

The court instructed the jury with respect to "possession" as follows:

"Members of the jury, the law recognizes two kinds of possession, actual possession and constructive possession.

"A person shown who knowingly has direct physical control over a thing at a given time, is then in actual possession of it.

"A person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over the thing, is then in constructive possession of it.

"The law recognizes also that possession may be sole—that is to say, restricted to one person, or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, their possession is joint.

"If you find from the evidence beyond a reasonable doubt that a defendant, either alone or jointly with others, had actual or constructive possession of heroin, then you may find that such heroin was in the possession of that defendant within the meaning of the word 'possession' as used by me here in these instructions." (A. 136).

The court also stated:

> "Concerning the so-called conspiracy counts, that is to say, count 1 of the indictment, if the evidence which under my instructions you may consider as to each defendant on that count, shows beyond a reasonable doubt that a defendant knowingly had possession of heroin in furtherance of the conspiracy, if any, then as to any such defendant it is not necessary for the government to adduce evidence that heroin was unlawfully imported or that such defendant knew it was unlawfully imported.
>
> "The defendant's possession raises a presumption that the heroin was unlawfully imported, and the burden then is upon that defendant to rebut that presumption to your satisfaction." (A. 135).

As to petitioner Guido, no actual, or even constructive, possession was proven.

The statute, Section 174, Title 21, U. S. Code, states:

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Such statutory provision does not, ". . . raise a presumption that the heroin was unlawfully imported" from the fact of a defendant's possession.

In *United States* v. *Mont*, 2-6 in: 306 F. 2d 412 at p. 416, the court said:

> "The Government always has the burden of establishing that the defendant knew that what he was receiving, concealing, etc., was a narcotic drug imported in violation of law; guilty knowledge is clearly an essential element of the offense defined in 21 U.S.C. Sec. 174. *Harris* v. *United States*, 359 U.S. 19, 23."

And in *United States* v. *Hernandez*, 2 Cir., 290 F. 2d 86, that Circuit stated, p. 90:

> "Possession, actual or constructive, must be shown with respect to each individual conspirator, facilitator, or aider and abettor. Possession by another defendant by itself is not enough. *See United States* v. *Santore*, *supra*, 2 Cir. November 15, 1960, 290 F. 2d 51 . . .
>
> "We yield to no one in our horror at the evils of the narcotics trade. Nevertheless we feel that law enforcement, here as in all cases, must be in accordance with American legal principles and, in any event, must not go beyond Congressional directives. Moreover, suppression of the narcotics trade can hardly turn uniquely on extension of the unusual presumption accorded the Government in 21 U.S.C. 174, for the Government has at hand many other statutory prohibitions under which it may proceed. See, *e.g.*, 26 U.S.C. 4704, 4705; and 7237; *Pappalardo* v. *United States*, 6 Cir. 218 F. 2d 694, certiorari denied 349 U.S. 920, 75 S.Ct. 659, 99 L.Ed. 1252. We know of no reason why all narcotics prosecutions should be based on this one statute when legal conflicts may be avoided by prosecution under other statutes."

The importance of the treatment of this question has recently been demonstrated by your Honors' decision in *Wong Sun* v. *United States*, 371 U.S. 471, 9 L.Ed. 2d 441; 83 S.Ct. 407, (1963), wherein a conviction for the violation of narcotic laws was reversed. Your Honors stated, p. 493:

> Surely, under the narcotics statute, the discovery of heroin raises a presumption that someone—generally the possessor—violated the law. As to him, once possession alone is proved, the other elements of the offense—transportation and concealment with knowledge of the illegal importation of the drug, need not be separately demonstrated, much less corroborated. 21 U.S.C. Section 174. Thus, particular care ought

to be taken in this area, when the crucial element of the accused's possession is proved solely by his own admissions, *that the requisite corroboration be found among the evidence which is properly before the trier of the facts . . .*" (Emphasis added).

In this case, not only was there no statement by the petitioner incriminating himself, the chief government witness was both uncorroborated and impeached; and more: both the prosecutor came to his aid by jury argument assertion that the witness told the truth before the grand jury (contrary to the witness' own statement) and the trial judge also came to his aid in refusing to instruct on the treatment to be accorded the testimony of an eight-times convicted felon.

10.

Compounding all the other violations of petitioner's right to a fair trial, he was prejudiced because of unfair publicity before, and, mostly, during the trial. The trial court refused to examine each juror outside the presence of the others with respect to the prejudicial publicity.

During this trial, petitioner Louis Guido was denied his right to a fair trial because he was unduly prejudiced by unfair publicity.

His brother, Nick Guido, was on trial for a particularly heinous robbery in the state criminal court (A. 8-9). A chief witness against Nick Guido was his wife, Pat Guido, who was also a witness against the defendant Louis Guido in this trial (A. 9, 94-5).

The defendant was apprehensive that certain publicity attendant upon his brother Nick's state criminal trial would affect dispassionate consideration of his own trial if he were compelled to go to trial in the federal court so immediately after his arraignment (A. 8-9).

The instant indictment was returned on October 4, 1962 (A. 1) and the defendant was arraigned and pled not guilty on November 19, 1962 (A. 1). The trial court allowed until November 30 for the filing of motions (A. 2), and certain motions for a bill of particulars, for relief from prejudicial joinder, for a severance were made and overruled (A. 2-7).

The trial was set for January 2, 1963, at which time the court indicated that a jury would be picked and the trial would commence on January 7. On that day, and before the selection of any juror, Guido moved for a change of venue to another district because of the prejudicial publicity appearing in the daily newspapers of the community for two weeks prior (A. 7). His motion (A. 8-9) stated that he feared he would be unable to obtain a fair trial in the Northern District of Illinois. He further stated in his motion that his brother, Nick Guido, was a defendant in a criminal case in the Criminal Court of Cook County, "...about which case the newspapers of this community published long and detailed reports of the trial daily. Your defendant further avers that the coincidence and simultaneity of your defendant's trial with the state trial of his brother is prejudicial to him by virtue of prejudicial and inflammatory stories which appear in the daily press about his brother, Nick Guido. Your defendant avers that it is expected, if this trial commences on January 7, 1963, that the state case against his brother will conclude; if such conclusion of the State trial is adverse to your defendant's brother, your defendant fears that such large publicity will be attendant upon the conviction (if any) of his brother, that the newspapers of this community will give undue headline attention to such conviction; and that such publicity will be prejudicial to your defendant." It

was further pointed out in the motion that the newspaper stories revealed that Nick Guido's wife, Mrs. Pat Guido, who testified against Nick Guido in the state trial would also appear in the federal trial against Louis Guido (A. 9).

Attached to the motion were certain exhibits, reproduced in Book of Exhibits, pp. 1 to 4.

The motion was denied (A. 10).

Guido renewed his motion for a mistrial several times during the course of the trial on the basis of prejudicial publicity appearing in the newspapers (A. 10 and 11).

On Thursday, January 17, 1963, near the conclusion of the trial, Guido moved for mistrial based upon prejudicial publicity which appeared in banner headlines on all four of the metropolitan newspapers on January 16, 1963 (A. 11-13).

The motion stated that on January 7, 1963, the defendant pointed out to the court the possible prejudice to him which might ensue if his brother Nick Guido were convicted in the state court (A. 11). The prejudicial headline publicity, coming as it did just prior to jury argument prevented the defendant from having his own case evaluated on the evidence only. We point out that this is not a case where the evidence is overwhelming against the defendant. The evidence is paper thin, if evidence at all. The trial judge expressed considerable dubiety about letting the case go to the jury (A. 109-111). In the face of this record then, the exposure to the jury of headlines on January 16, 1963, could not but prejudice the defendant. Some of the headlines carrying full banner across the front page (see Book of Exhibits, pp. 15 to 18) were as follows:

"GUIDO, PAL GET 60 TO 100 YEARS"
(Chicago's American, Wednesday, January 16, 1963)
"TERROR BANDITS GET 60 YEARS"
(Chicago Daily News, Wednesday, January 16, 1963)
"TWO TERROR BANDITS GIVEN 60-YEAR TERMS"
"SAME FOR GUIDO—YONDER GETS 60-100 YEARS. TRIES TO SEIZE COP'S GUN"
(Chicago Sun-Times, dated January 17, 1963, but sold on the news stands and distributed on Wednesday, January 16, 1963)
"60 YEARS FOR BANDIT PAIR"
(Chicago Tribune, Thursday, January 17, 1963, but sold on the news stands and distributed on Wednesday, January 16, 1963)

The stories in each of the papers detailed certain aspects of the criminal trial against Nick Guido. All newspaper stories carried the fact that Mrs. Pat Guido, wife of Nick Guido testified against him. The jury in the instant case heard Mrs. Pat Guido testify against the instant defendant Louis Guido. If the jurors had their attention called to the fact that Mrs. Pat Guido testified in both cases such fact would prejudice the defendant's right to a fair trial as a juror might conclude that another jury, listening to Mrs. Pat Guido's testimony, chose to believe her.

It was further averred in the motion presented to the court that no juror could escape reading the headlines; and that such prominent stories coming on the eve of the presentation of his case to the jury prejudiced his right to a fair trial in accordance with due process of law (A. 13). The court denied the motion (A. 13).

We point out that there was no particular reason shown in the record why this case should have proceeded to trial with such unseemly haste when it was pointed out to the trial court the possibility that prejudicial publicity might affect the outcome of the case. The indictment was returned October, 1962, and the defendant was arraigned on November 19, 1962, and was put to trial during the first week of January, 1963. Aside from the short time permitted defense counsel for preparation of defendant's case (the Christmas holidays intervened), aside from the denial by the court of any of defendant's fifteen requests for a bill of particulars (A. 2-3), the defendant demonstrated to the court possible prejudice. In fairness to the defendant, the trial should have been put over, at least until the attendant hue and cry about his brother's case were over.

At each noon recess and, at the conclusion of each day's trial day, the court admonished the jury, ". . . not to talk with anyone about the case, not to let anyone talk to you about the case, nor talk with each other about this case. I direct you not to read any newspapers or any other publication during this trial. I direct you not to listen to the radio, or to listen to television while you are a member of this jury (A. 37)." Each time the admonition was given, the approximate same language was used.

However, on January 17, Guido moved the court, "... to conduct a *voir dire* examination of each juror out of the presence of the others to determine whether or not any publicity about this case or any publicity about Nick Guido's case which they might have read interpreted something about this case has come to their attention." (A. 129).

Each case must rest on its "special facts". *Marshall v. United States*, 360 U.S. 310. True it is that the trial judge admonished the jury at the conclusion of each session of the trial before the noon recess and before they separated after the afternoon session. Still, when the community was saturated with banner headlines on January 16 and 17 as indicated above, just prior to the jury receiving the final arguments in the case we submit it became incumbent upon the court to examine each juror outside the presence of each other. As was said in *United States v. Accardo*, 7 Cir., 298 F.2d 133, 138 citing *Coppedge v. United States*, D. C. Cir. 272 F.2d 504, 508,"

> "There is no certainty that all jurors would volunteer information about violating the admonitions or admit that they were influenced by the publicity . . . He (the judge) should have, by the careful examination of each juror, out of the presence of the others, determined the effect of the articles on those who had read them and whether they had discussed the articles with others . . . *These individual interviews would have tended to overcome reluctance to speak out.*" (Emphasis added).

Compare *United States v. Denno*, 2 Cir. 313 F.2d 364 (1962) where the court stated, in reversing a conviction of murder in the state courts where the press saturated the community eight months prior to the trial, that (p. 372):

> "The reviewing court must determine, from a review of the entire *voir dire* whether the extent and nature of the publicity has caused such a build-up of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial."

And as the Second Circuit further said, p. 372, "Jury impartiality must be measured by the standards established by the Supreme Court in the line of cases culminating in *Irvin v. Dowd*, 1961, 366 U.S. 717, 81 S.Ct. 19639, 6 L.Ed. 2d 751." See also *Kibbeau v. Louisiana*, 1963, 373 U.S. 723.

The Court of Appeals felt that "Since the publicity was not about Louis Guido nor of his trial, and since the district court's admonitions satisfied the requirements for a fair trial under the 'special facts' of this case, there is no merit in this claim and *United States v. Accardo*, 298 F. 2d 133 (7 Cir. 1962) does not apply." (Opinion, Appendix A, p. 6).

But we point out that the screaming newspaper headlines appearing in all four of the daily metropolitan newspapers in the Chicago area on the evening before and the morning of the jury argument set out the name "Guido" in bold block-print letters. The jurors could not know that the adverse and prejudicial publicity was about petitioner's brother and not about petitioner himself unless they read the articles (See Book of Exhibits, pp. 15 to 18).

We submit that under the "special facts" here, it was prejudicial not to inquire of each of the jurors outside the presence of the others.

CONCLUSION.

We respectfully submit no more obvious miscarriage of justice is likely to come before your Honors than the case here sought to be reviewed. The evidence is completely insufficient; and the Court of Appeals sanctioned procedures which are constitutionally impermissible.

We pray your Honors will consider this a fit case to warrant this court's attention.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for petitioner.

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 14145-14149

SEPTEMBER TERM, 1963 SEPTEMBER SESSION, 1963

No. 14145
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALEX MICELE,
Defendant-Appellant.

No. 14146
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LOUIS GUIDO,
Defendant-Appellant.

No. 14147
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN C. PELLEGRINI,
Defendant-Appellant.

No. 14148
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THOMAS McGARRY,
Defendant-Appellant.

No. 14149
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALBERT SAKAL,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

January 8, 1964

Before KNOCH, KILEY and SWYGERT, *Circuit Judges*.

KILEY, *Circuit Judge*. These five appeals arise from the same trial by jury under an indictment of nineteen counts, the first charging conspiracy, and the balance charging substantive offenses, in violation of narcotics laws.[1]

The conspiracy count named these five defendants, fourteen other defendant co-conspirators, and fourteen non-defendant co-conspirators, and alleged the conspiracy lasted from the summer of 1960 through 1962. Louis Guido and Albert Sakal[2] were named in the conspiracy count only; Alex Micele, John Pellegrini and Thomas McGarry were named in the conspiracy count and one or more substantive counts. All were found guilty of the various charges against them except that Pellegrini was found not guilty of the substantive offense charged against him.

For the sake of convenience, we shall treat as one each question common to each appeal.

Micele, Guido, Sakal and McGarry contend there is insufficient evidence to support their convictions under the conspiracy. Taking the evidence in the light most favorable to the government, as we are required to do, *United States* v. *Glasser*, 315 U. S. 60, 80 (1942), there is evidence showing that Micele with Louis Vaselli agreed to furnish narcotics to Albert Spagnolia, and that they did so; that Micele with Anthony D'Agostino discussed with Frank Milazzo an opportunity to "pass the stuff" and both took him to meet Guido; that Micele passed narcotics to Milazzo for Pellegrini; that Guido told Millazzo that Micele and D'Agostino owed him money and later Micele left money at a night club for Guido; that Guido indicated to Milazzo

[1] In violation of 21 U. S. C. § 174.

[2] The indictment named Sakal as "Al Sacko."

that Micele and Guido were partners; that Vaselli and Guido met several times in Guido's apartment; that Nick Guido's wife heard him tell Louis Guido that the latter made money with Vaselli in the "narcotics racket;" and that Micele, Pellegrini and Milazzo were arrested in the apartment building where Guido lived as they were returning narcotics which customers claimed were of poor quality.

There is other evidence showing that Vaselli and Joe Gaynor sold narcotics to Sakal; that they tested narcotics in Sakal's apartment; used by addicts; that these addicts were Sakal's market for distribution; and that Sakal and his roommate would be able to do a good business.

There is evidence of Vaselli leaving a package of white powder on a window sill, McGarry giving Vaselli money and picking up the package; of Stanley Miller's selling narcotics to McGarry; and of McGarry selling narcotics to a government agent.

We conclude that there is sufficient evidence to support the convictions under the conspiracy count. We see no necessity of discussing cases that went off on grounds of "mere suspicion," "mere association," "mere knowledge, approval of or acquiescence in" the goals of the conspiracy. They have no application here. The evidence amply justified an inference that each of the defendants knew of the conspiracy and associated themselves with it. *United States* v. *Avila*, 274 F. 2d 179, 189-90 (2d Cir. 1960), *cert denied*, 362 U. S. 974, *Nye & Nissen* v. *United States*, 168 F. 2d 846, 852 (9th Cir. 1948).

We see no merit in the contention that the defendants were prejudicially misjoined in Count One. We do not agree that the proof showed two conspiracies with some of the defendants participating in but one, and that they were

accordingly harmed by the evidence of the other conspiracy. The testimony showed what might be called a north side group—Guido, Vaselli, Micele—and a south side group—Vaselli, Gaynor—in the distribution of narcotics. It is true that Guido's and Pellegrini's names appear only in the north side distribution process and there is no testimony that they knew the members of the south side group or vice versa, or had any connection with them other than through Vaselli and to some extent Gaynor. But that is not fatal to the joinder. *United States* v. *Carminati*, 247 F. 2d 640, 644 (2d Cir. 1957), *cert. denied*, 355 U. S. 883, *United States* v. *Cohen*, 197 F. 2d 26, 29 (3d Cir. 1952).

The integrated distribution structure, shown by the testimony, did not preclude the inference that those separated from each other at lower levels, as Pellegrini, Sakal and McGarry were, knew the common source of the narcotics at the top: Vaselli and Guido. It was a single-structured conspiracy, and *Kotteakos* v. *United States*, 328 U. S. 750 (1946), does not apply. It is unimportant that the proof as to those at lower levels does not carry them to the conspiracy's end. *United States* v. *Stramberg*, 268 F. 2d 256, 264 (2d Cir. 1959), *cert. denied*, 361 U. S. 863, 868.

For these reasons we think the court did not err in denying severance as to Guido, Pellegrini and Micele. Since there is no merit to the contention of misjoinder of the conspiracy count, the court did not err in instructing the jury to consider the testimony of all witnesses, with certain exceptions, against all defendants.

We see no merit either in Pellegrini's contention that he was prejudiced by the court's denial of his motion for a severance because he was not named with any other defendant in a substantive count against him and was compelled to stand trial with other defendants.

And we see no merit in the claim of McGarry's "entrapment." The evidence plainly refutes his claim that the seed of his offense was planted in his mind, and that he was an otherwise innocent person.

Pellegrini, Micele and Guido claim error in denial of their motions for bills of particulars. The motions were addressed to the district court's discretion, *United States v. Holovachka*, 314 F. 2d 345, 349 (7th Cir. 1963), *cert. denied*, 374 U. S. 809, and we have not been shown any abuse of discretion in the court's ruling. The court could with reason have concluded the motions called "for too much details of evidence," *Wong Tai v. United States*, 273 U. S. 77, 82 (1927). Based on our inspecting the indictment, we conclude that defendants were sufficiently "apprised of the nature of the offense charged" against them, and there was probably "no danger of a violation of the principles of double jeopardy." *United States v. Garfoli*, ... F. 2d ..... (7th Cir. No. 14158, November 22, 1963).

During the cross-examination of Milazzo, attorney for Guido asked him whether he had not been a partner in robberies with Micele. The court repeatedly sustained objections with repeated caution to Guido's attorney who seemed bent upon producing error, or trying to save Guido by attempting to impeach Milazzo at Micele's expense. *United States v. Cohen*, 124 F. 2d 164, 166 (2d Cir. 1941). We cannot say the incident was reversibly erroneous. *Ibid.*

Guido, and Pellegrini adopting Guido's argument, claim prejudice through unfair publicity arising from the extensive newspaper publicity about a notorious trial of his brother, Nick, in a state court contemporaneously with the trial in the case before us; and because of the participation by Nick's wife, Mrs. Pat Guido, in Nick's trial and this one.

The district court admonished and cautioned the jury at each noon recess and at the close of each day's session against reading or looking at newspapers, listening to the radio or television, or looking at television, or discussing the case with each other or with others. On the day following what seems to be the most prominent publicity of his brother's conviction, Louis Guido moved for an *in camera* examination of each juror. The court denied the motion but gave a thorough cautionary instruction to, and examination of, the jury *en banc*. Since the publicity was not about Louis Guido nor of his trial, and since the district court's admonitions satisfied the requirements for a fair trial under the "special facts" of this case, there is no merit in this claim and *United States* v. *Accardo*, 298 F. 2d 133 (7th Cir. 1962) does not apply.

Guido also claims error in the court's limitation of cross-examination of Mrs. Pat Guido with respect to her employment and to money she testified seeing exchanged between Nick and Louis Guido. We have examined the direct and cross-examinations of this witness and see no abuse of discretion in the court's limitation of the cross-examination. The limited cross-examination was sufficient basis for an estimate of the witness and her credibility; and unless the limitation was imposed, the cross-examination would have included improper impeaching questions that could have led to seriously diverting rebuttal testimony.

Miceli, Guido and Pellegrini claim prejudice in the district court's failure to instruct the jury properly upon the testimony of accomplice Milazzo. The instruction proffered, and refused, was:

> "Where an accomplice is also an admitted felon—you must treat this testimony with even greater suspicion, and you must act upon it with even greater hesitation."

The pertinent instruction given was:

> "* * * the testimony of an accomplice witness, is to be received with caution, and weighed with great care."

The given instruction is not altogether as strict as the court, in *Crawford* v. *United States*, 212 U. S. 183, 204 (1909), implies an instruction under such circumstances ought to be. On the other hand it does not fall so short of the mark as to be reversible error because on the whole record we are not of the opinion that the failure to give the proffered instruction prejudiced defendants. *Id.* at 204.

During the trial motions were made for an *in camera* examination of the grand jury testimony for inconsistencies in the testimony of prosecution witnesses Milazzo and Miller before the grand jury and at the trial, and the government offered the minutes of the grand jury testimony for *in camera* inspection. The motions were denied. Because a stricken answer of Milazzo indicated possible inconsistencies, and because he and Miller were main prosecution witnesses, and accomplices and felons, we thought a sufficient "particularized need" had been demonstrated so that the court should make an *in camera* examination of the grand jury testimony for the "inconsistencies" which defendants argued were probably in that testimony. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 399 (1960), *United States* v. *Nassar*, 301 F. 2d 243, 245 (7th Cir. 1962), *United States* v. *Mazin*, 280 F. 2d 74, 79 (7th Cir. 1960).

Accordingly, following *United States* v. *Santore*, 290 F. 2d 51, 67 (2d Cir. 1960), we ordered the trial judge to examine the grand jury testimony *in camera* and to certify to us: (1) whether there were inconsistencies in the testimony

of Milazzo and Miller, and if so (2) whether they were material; and to transmit to us the grand jury testimony. The judge has transmitted, *sealed*, the grand jury testimony to us with his certificate that he has examined the grand jury testimony and compared it with the transcript of the trial testimony and written statements of the witnesses produced at the trial; and that there were no material inconsistencies.

We have read the grand jury testimony of Milazzo and Miller and agree with the trial judge that no material inconsistencies appear. Their testimony at the trial may be more expansive, but on the whole we see no inconsistencies, and we cannot see that denial of *in camera* examination and use of the grand jury testimony to impeach was prejudicial.

Since the sentences of Miccle's convictions on the two substantive counts are to run concurrently with his sentence on the conspiracy count, and since his conviction is justified on the conspiracy count, we need not consider the contentions he raises as to the substantive counts. *United States* v. *Doran*, 299 F. 2d 511, 514 (7th Cir. 1962).

For all the reasons given, the judgments are affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

Chicago, Illinois, 60610
Friday, January 31, 1964

BEFORE

Hon. WIN G. KNOCH, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ALEX MICELE, LOUIS GUIDO, JOHN C. PELLEGRINI and ALBERT SAKAL, *Defendants-Appellants.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 14145-46-47-14149

It Is Ordered By The Court that the petitions for rehearing filed by defendants-appellants Alex Micele, Louis Guido, John C. Pellegrini and Albert Sakal be, and the same are hereby Denied.

APPENDIX "B-1"

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois, 60610

Friday, January 31, 1964

BEFORE

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. T. RYAN DUFFY, *Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ALEX MICELE, LOUIS GUIDO, and JOHN C. PELLEGRINI, *Defendants-Appellants.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 14145-46-47

It Is Ordered by the Court sitting en banc that the petitions for rehearing filed by defendants-appellants Alex Micele, Louis Guido and John C. Pellegrini, be, and the same are hereby, Denied.

APPENDIX "C"

Section 174, Title 21, United States Code

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned . . .

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Office-Supreme Court, U.S.
FILED
APR 22 1964
JOHN F. DAVIS, CLERK

No. 882

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

LOUIS GUIDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Certiorari to the United States Court of Appeals
for the Seventh Circuit

Reply Brief for Petitioner

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IN THE

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vs.

UNITED STATES OF AMERICA,

Respondent.

Certiorari to the United States Court of Appeals
for the Seventh Circuit

Reply Brief For Petitioner

May It Please The Court:

In view of the nature of the respondent's presentation, we deem it appropriate that recurrence be had to the issues between the parties. The "questions presented" by the government are phrased differently from that posed by the petitioner.

THE EVIDENCE

Respondent's presentation of the evidence is inaccurate in material aspects; and we are compelled to call these errors to the attention of the Court. The same erroneous suggestions by the government in its brief to the Appellate Court impelled the opinion by the appeals court in setting out "facts" which do not exist. For example, in the government's brief filed in the Court of Appeals, it stated flatly that, ". . . Micele left $1100 for Louis Guido" at the Club LeFemme (Gov't. Br. in Court of Appeals, p. 16). The Court of Appeals so found stating, ". . . and later Micele left money at a night club for Guido." (Opinion, App. p. 2). We pointed out in our brief that the government witness, Milazzo stated that Micele left $1100 at the Club LeFemme for "Louis" (Petition, p. 9). We further pointed out that Milazzo testified he did not know *for which "Louis" the money was left* there were three such persons at the Club LeFemme named "Louis" (Petition, p. 12; A. 67; Original Record p. 406).

Again, the brief for the government in this court states, "Shortly thereafter, Micele and Milazzo drove to the Club LeFemme because Micele 'had to bring some money to the Club.' (R. 46). When 'Lou [Guido] wasn't there.' (R. 46). Micele said he would leave the money ($1125) for him (R. 46-47, 67)." The reference to $1125 is in the record—that is why the government's reference to that sum of money is in PARENTHESIS. *But Guido's name is nowhere mentioned in the record by Milazzo as having received* $1125—and so the government puts BRACKETS around his name to indicate to your Honors that there is no reference to Guido in this connection in the record. Yet, the twisting of the testimony of Milazzo is such that the government argues that Guido was not there. Neither were

two other "Lou's" about whom Milazzo testified. Milazzo testified that he did know for which "Louis", Miccle had left the money because, as Milazzo testified, Miccle did not say for whom he left the money. *Miccle did not mention any last name* (A. 67).

The government also asserts (its Brief, p. 5) that, "In late October, at the Club, Le Femme, Guido asked Milazzo whether Miccle had told him that Guido and Miccle were partners (R. 47, 66)." This statement misreads the record. The record is as follows: Milazzo is testifying (Abstract 47; Original Record of Proceedings, 272). "He (Guido) asked if Alex (Miccle) had discussed with me (Milazzo), told me (Milazzo), about us (Milazzo and Miccle) being partners. I told him no, Alex didn't say anything to me, and I walked off."

The pronoun references are unmistakable. Milazzo's testimony cannot be interpreted to mean that Guido indicated that Miccle and Guido were partners; but only an inquiry by Guido to Miccle as to whether Miccle said anything to Milazzo about Milazzo and Miccle being partners. So that there could be no question about the references to the parties, Milazzo was asked on cross examination as follows:

> "Q. At one point in your direct examination you stated that Louis Guido stated to you at the Club Le Femme some time in October, 1960, he asked you if you had discussed something with Alex about being partners with him, with Alex; is that right?
>
> A. (by Milazzo) That is correct." (A. 65-66; Original Record of Proceedings, 400).

But such is the thinness of the government's case that it is necessary to misinterpret the record in order to throw even a shadow of suspicion against petitioner.

The government correctly advises the court that "... The trio (Milazzo, Micele and Pellegrini) drove to the apartment building at 732 Bittersweet Place where Guido lived (R. 50, 94). Milazzo was arrested in the building lobby (R. 50)". (Gov't. Br. p. 6). But the government does not point out, as we do, that there were 102 apartments in that building (A. 94). There was no testimony by Milazzo or by any witness, who they were going to see to return "bad" narcotics.

1.

The record contains no evidence to support a finding of conspiracy on the part of the petitioner.

The government asserts that "the sufficiency of the evidence is not a matter warranting review by this court." (Its Brief, p. 10). In two recent cases, *Thompson* v. *Louisville*, 362 U.S. 199, 4 L.Ed. 2d 654, 80 S.Ct. 624, 80 ALR 2d 1355 and *Garner* v. *Louisiana*, 368 U.S. 157, 7 L.ed. 2d 207, 82 S.Ct. 248, this Court determined that a conviction based on a record which contains no evidence to support the finding is a constitutional violation of petitioner's rights. Although we believe we demonstrated the complete lack of evidence in our argument in our petition in chief (pp. 24-32) we would like to summarize the only existing evidence, such as it is, against petitioner Guido.

Fact 1. Government witness Milazzo happened to meet Guido at the Club LeFemme in July, 1960. Milazzo just got out of the penitentiary (A. 38). As he left the tavern Guido walked Milazzo and Micele to the door and said, "Let's get Frankie (Milazzo) back in action" (A. 41). No one replied: *and there was no interpretation of what "action" meant.*

Fact 2. In October, 1960, Milazzo happened to meet Guido at the Club LeFemme without prearrangement.

Guido remarked that Alex (Miccle) and Hooks (D'Agostino) owed him $1800 (A. 45). (Earlier in Milazzo's testimony he said that he met Miccle and D'Agostino in July, 1960 and talked with them about narcotics (A. 38).

Fact 3. Some time in the middle of October, Miccle went to the Club LeFemme with Milazzo and remarked to Milazzo that he was bringing money to the Club. Miccle remarked that "Lou" wasn't there and said he would leave the money. Miccle left $1125 for "Louis" (A. 46). (There was testimony by Milazzo that he did not know whether or not the money was left for Louis Guido or whether it was left for one of two other "Lou's" who frequented the Club LeFemme (A. 67).

Fact 4. In late October, 1960, Milazzo saw Guido at the Club LeFemme and Guido asked if Alex Miccle had discussed with Milazzo about Milazzo and Miccle being partners (A. 47, 66). (Nothing was said by any witness as to what Miccle and Milazzo were to be "partners" in. There was an offer of proof by petitioner that the partnership referred to might refer to a partnership in burglaries, as Miccle and Milazzo were convicted together for burglary offenses (A. 65).

Fact 5. On November 11, 1960 Milazzo, Miccle and Pellegrini drove to an apartment house where Guido lived in one of the 100 apartments. Miccle was supposed to return to some one (name never mentioned in the record) some narcotics about which customers made complaints (A. 50).

Fact 6. In November 1961 (over a year later) Vasselli visited Guido's apartment and talked with Guido in the bedroom (A. 95). (There was no testimony regarding the subject matter of the talks between Louis Guido and Louis Vasselli).

Fact 7. Mrs. Pat Guido, wife of Nick Guido, brother of petitioner, testified that in the first week of November, 1961, she saw Louis Guido give her husband Nick Guido small money in exchange for large bills (A. 95).

Fact 8. Mrs. Pat Guido also testified that around April 20 or 21, 1962, "Louis Guido told my husband, Nick Guido, to be fair with Louis Vasselli because Louis Vasselli was one person that could cause him, Louis Guido, a lot of trouble. Nick Guido told his brother, Louis Guido, that he made all the money with him in the narcotics racket, so he should be responsible for and take care of Louis Vasselli" (A. 95).

Such is the entirety of the evidence touching upon the petitioner directly.

The government concludes that Guido was one of the "higher-ups". It does not advise this court what evidence justifies this unwarranted inference. The government suggests to your Honors that petitioner, "by his own statement" was a partner with Miele and Vasselli. (Its Brief p. 10). *It does not, however, because it cannot, point to any reference in the record where petitioner himself made any such statement.*

We reiterate, "An accumulation of nothings is still nothing" *Reiss* v. *United States*, 324 F.2d 680, 685, 1 Cir. (1963). "Conspiracy cannot be established by mere 'inferences no more valid than others equally supported by reason and experience' *United States* v. *Bufalino*, 2 Cir. 1960, 285 F.2d 408, 419," *Reiss*, 685.

2.

If anything were shown at all, separate conspiracies were shown.

Taking the government's case at its best, and believing everything that all government-witnesses testified to, there is no proof of Guido's participation in a conspiracy with co-defendant Sacko and McGarry. The government asserts that the conspiracy was essentially "unitary". (Its Brief, p. 11) but it does not advise the Court of the details of the unitary connection.

The Court of Appeals failed to apply the rule in *Kotteakos* v. *United States*, 328 U.S. 50.

3.

Under the circumstances of this case where the government relied chiefly on the testimony of an eight-times convicted felon, petitioner was entitled to an instruction that the testimony of a felon is to be received with great care and caution.

As we pointed out, the trial court gave an accomplice instruction to the effect that his testimony should be received with caution and weighed with great care. There was no quarrel with that instruction as such. However, we requested of the trial court an instruction suggested by *Crawford* v. *United States*, 212 U.S. 183, 204. And that is that "... where an accomplice is also an admitted felon, you must treat the testimony with even greater suspicion and you must act upon it with even greater hesitation." (A. 130, 141). The trial court did not give *any instruction*, although requested, with respect to how the jury should treat the testimony of one who had previously been convicted of a felony—let alone convicted eight times.

It is of this failure that we complained; and not of the particular accomplice instruction given.

In *Delaney v. United States*, 77 F.2d 916, 917 the Third Circuit reversed because the trial court refused to instruct the jury, as requested by defendant, "* * * that, in determining the credibility of the (government) witness, it take into consideration the fact that he had previously pleaded guilty to the commission of a crime."

The government omits any comment on why the failure to give such a requested instruction was not error.

4.

It was error for the trial court to rehabilitate the government's chief witness by striking his answer that his testimony before the grand jury on the first occasion of his appearance was different from his testimony at the trial.

Petitioner argued (his Brief, pp. 38-40) that the trial court was in error in striking the government witness Milazzo's testimony to the effect that when he first appeared before the grand jury he denied his participation in any of these (narcotic) activities. There was no legal justification for the court's action.

Nowhere in the government's brief does it discuss this claimed reason for the grant of certiorari.

5.

The grand jury minutes should have been made available to the petitioner.

Where the chief government witness Milazzo testified he gave trial testimony inconsistent with his grand jury testimony (A. 51), where he admitted that upon first interrogation he lied to agents of the FBI (A. 51; Original Record of Proceedings 320), a "particularized need" was demonstrated for the production of the grand jury minutes.

After oral argument, the Court of Appeals required the trial judge to read the grand jury minutes and certify to the Appeals Court its opinion regarding the existence of any material inconsistency (Opinion, App. 7).

Your Honors should grant the writ in order to determine whether or not, under circumstances as demonstrated here, defense counsel should be permitted access to the grand jury minutes for the purpose of cross-examination. Your Honors should advise under what circumstances a defendant is entitled to use grand jury minutes for purposes of cross-examination. The District of Columbia suggested such permissible use in *Gordon* v. *United States*, 299 F. 2d 117, 118.

6.

The prosecutor's closing argument offended essential fairness.

The chief government witness Milazzo testified he told a different story to the grand jury on the first occasion of his appearance than at the trial (A. 51). Upon motion of the government, the trial judge struck the answer and told the jury to disregard it (A. 51).

In arguing the case to the jury, the prosecutor told the jury that Milazzo told the truth before the grand jury (A. 132). Defense objections to the unwarranted statement were overruled.

The government now asserts that the prosecutor's remarks were invited by defense argument; and that because defense counsel told the jury that Milazzo "lied [to the FBI] may he not lie now for whatever purposes he has?" But it was *in* the record that Milazzo lied to the FBI (A. 51). Milazzo testified that two FBI agents inter-

viewed him at the penitentiary and asked him questions regarding the events of his testimony, and he denied participation in any of these events (A. 51). Milazzo was asked if he lied to the FBI and he replied that he did (A. 51; Original Record of Proceedings, 329).

There was, however, *nothing in the record* from which the prosecutor could argue that Milazzo told the truth before the grand jury. To the contrary, there was in the record (although stricken by the judge without legal authority) Milazzo's testimony that he told a different story on the first date of his appearance before the grand jury than his trial testimony (A. 51).

We respectfully submit that no argument of any defense counsel invited the prosecutor to use the high office of United States Attorney to advise the jury that Milazzo told the truth before the grand jury—especially in the face of Milazzo's testimony to the contrary.

7.

Petitioner was limited in his right to cross-examine.

Petitioner was prevented from finding out, via cross-examination, what the "partnership" was about that Guido was alleged to have mentioned. The government argued Guido mentioned to Milazzo something about a partnership in narcotics activity. Defense was foreclosed from arguing, because defense was prevented from cross-examining, that "partnership" meant partnership in burglaries, in which Milazzo and Miccle had previously been convicted together.

With respect to Mrs. Pat Guido and the limitation of examination with regard to money which Mrs. Pat Guido said Louis Guido exchanged with her husband Nick Guido,

the government states that the questions about the money ". . . had nothing to do with the issues in this case." (Gov't. Br. p. 17).

Yet, in its case in chief, the government had Mrs. Pat Guido testify that in November, 1961, Louis Guido exchanged small bills with brother Nick Guido for large bills (A. 95; Original Record of Proceedings, 813). The government even argues in this Court that a "fact" to be taken into consideration in determining that there was sufficient evidence against Louis Guido is that "on one occasion in November, Louis Guido gave to his brother Nick Guido paper money in small denominations for $100 bills" (Gov't. Br. p. 8). *Yet, the government argues on page 17 of the same Brief that the questions regarding the money "had nothing to do with the issues in this case"!*

The purpose of cross examination is obvious: to test the witness, to make her retrench, to obtain details regarding the transaction in order to demonstrate possible falsity. To a whole series of questions regarding the money, the court sustained the government's objections (A. 108).

The limitations on the cross examination of Milazzo and of Mrs. Pat Guido denied petitioner a fair trial.

8.

The request for a bill of particulars should have been granted.

It is not clear from any decision in this Court when the denial of a bill of particulars is proper and when such denial affects the substantial rights of the defendant.

9.

Petitioner was not granted the right to review of his claimed error that the court instructed the jury improperly on an essential element of the crime.

We presented the argument on the above point at pp. 50 to 53 of our Brief.

The government nowhere answers this contention; except perhaps to state that because heroin was a substance which could not be legally imported that "... knowledge of illegal importation on Guido's part is a reasonable inference even without the aid of the presumption." (Gov't. Br. 11-12).

As no evidence was produced that Guido participated in any narcotic transaction, and as the court did not instruct the jury properly on the essential element of the crime, the government nowhere meets this contention in its Brief.

10.

The inflammatory headlines regarding "Guido" prejudiced petitioner in his right to a fair trial.

In our presentation on this point, pp. 53-59, we stated that the trial judge repeatedly admonished the jury not to read newspapers, watch television or listen to the radio.

We pointed out, however, that on the day before the case went to the jury, screaming headlines in all four of the

metropolitan Chicago newspapers proclaimed in large block letters (See Book of Exhibits, pp. 15 to 18) that,

"GUIDO, PAL GET 60 to 100 YEARS"

"TWO TERROR BANDITS GIVEN 60 YEAR TERMS"

"SAME TERM FOR YONDER—YONDER GETS 60-100 YRS, TRIES TO SEIZE COP'S GUN."

Both the Court of Appeals' opinion (App. p. 6) and the government here (Its Brief p. 15) assert that since most of the publicity did not relate to *Louis Guido* that no prejudice could have occurred. *But the only way the jury could know that the headlines did not pertain to the petitioner Louis was to have read the articles in question.*

Your Honors well know that a juror is loathe to raise his hand and advise the court that he did not follow the court's admonishment regarding publicity. The fairer method of interrogation would have been to permit a *voir dire* examination of each juror outside the presence of the others.

CONCLUSION

For the reasons asserted in our original brief, and here we respectfully submit the Petition for the Writ of Certiorari should be granted.

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